Petition

81-374

No.

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In the Supreme Court of the United States

October Term, 1981

MARATHON OIL COMPANY, CROWN CENTRAL PETROLEUM CORPORATION, TENNECO OIL COMPANY, and COLONIAL OIL INDUSTRIES, INC.,
Petitioners,

vs.

PATRICK A. MALCOLM, f/d/b/a SPAR OIL CO. and SPAR OIL CO. OF GEORGIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the recent decision of this Court in *J. Truett Payne Company, Inc. v. Chrysler Motors Corporation* forecloses an antitrust court from directing a verdict for defendants on the grounds of lack of evidence of fact of injury and amount of damages without first determining whether plaitniff has made out a claim of antitrust violation.

PARTIES

Marathon Oil Company;

Crown Central Petroleum Corporation;

Tenneco Oil Company;

Colonial Oil Industries, Inc.;

Georgia Independent Oilmen's Association, Inc.;

Patrick A. Malcolm f/d/b/a Spar Oil Company; and

Spar Oil Company of Georgia.

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No.

In the Supreme Court of the United States

October Term, 1981

MARATHON OIL COMPANY, CROWN CENTRAL PETROLEUM CORPORATION, TENNECO OIL COMPANY, and COLONIAL OIL INDUSTRIES, INC.,
Petitioners,

vs.

PATRICK A. MALCOLM, f/d/b/a SPAR OIL CO. and SPAR OIL CO. OF GEORGIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Marthon Oil Company, Crown Central Petroleum Corporation, Tenneco Oil Company, and Colonial Oil Industries, Inc. (hereinafter collectively referred to as "petitioners") respectfully petition for a writ of certiorari to the Eleventh Circuit to review the judgment of the United States Court of Appeals for the Fifth Circuit Unit B in this case.[1]

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1. Georgia Independent Oilmen's Association, Inc. ("GIOA") was a defendant-appellee below, but it did not participate at trial or in the appeal of this action. Defendants therefore believe that GIOA has no interest in the outcome of this petition under Rule 19.6 of the Rules of the Supreme Court.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Georgia granting defendants' Motion for a Directed Verdict is reported at [1977-2] Trade Cas. ¶61,547 (M.D. Ga.) and is attached hereto as Appendix A. The opinion of the United States Court of Appeals for the Fifth Circuit Unit B, now for the Eleventh Circuit, reversing and remanding the decision of the district court is reported at 642 F.2d 845 (5th Cir. 1981) and is attached hereto as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1981. A timely petition for rehearing was denied on July 27, 1981 in an opinion reported at 651 F.2d 1016 (5th Cir. 1981) (per curiam) and attached hereto as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, and § 4 of the Clayton Act, 15 U.S.C. § 15, are set forth in Appendix D.

STATEMENT OF THE CASE

Respondents Patrick A. Malcolm, f/d/b/a Spar Oil Company ("Malcolm") and Spar Oil Company of Georgia[2]

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2. Malcolm operated as a sole proprietorship under the tradename "Spar Oil Company" until he incorporated as Spar Oil Company of Georgia in the middle of 1972. Since Spar was only one business with two successive legal entities, respondents will hereinafter collectively be referred to as "Malcolm."

initiated this federal antitrust action against petitioners and seven other gasoline retailers and wholesalers on March 14, 1973. His two count Complaint charged defendants with violating Section 1 of the Sherman Act[3] by engaging in a conspiracy to fix the retail price of gasoline sold by "independent" retail dealers throughout Malcolm's marketing area and, in alleged furtherance of this conspiracy, by concertedly refusing to sell him gasoline in the fall of 1972. (R. 83).[4]

From 1964 until September 1972, Malcolm intermittently operated a number of small retail gasoline stations in south Georgia. Competitors and market conditions varied from one station to another (Tr. II, pp. 4-18; IV, pp. 12, 14, 23; IX, pp. 40, 43-44; XII, pp. 100, 105-106; XV, pp. 21, 42-45), and Malcolm himself testified that prices typically "fluctuate[d] greatly from week to week, month to month." (Tr. IV, p. 23).

Malcolm claimed that he sought to "sell gasoline generally from one to two cents below anybody else," even his

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3. While Malcolm's Complaint did include a claim of attempted monopolization under section 2 of the Sherman Act against Stone's Independent Oil Company, a former defendant, he made no such allegation against any of petitioners and neither tried to prove a section 2 offense at trial nor briefed or argued it on appeal. The court of appeals nonetheless "infer[red]" *sua sponte* that Malcolm "believed that the [petitioners'] actions constituted predatory pricing with intent to monopolize [in] violation of § 2 of the Sherman Act," 642 F.2d at 853 n.15, and upheld his putative proof of antitrust causation on this wholly new theory of violation. *See id.* at 855-58. In the face of petitioners' strenuous objections to this strained and improper alteration of the case, on rehearing the appellate court stated that it was not "decid[ing] whether Malcolm's allegations of price cutting are now properly cognizable under § 1 or § 2 of the Sherman Act; this was neither briefed nor argued. We leave those issues to the district court on remand." 651 F.2d at 1016.

4. This petition will cite to the record below as follows: record (R. .....); pretrial hearings (H. Tr. .....); trial transcript (Tr. .....); and trial exhibits (..... Exh. .....).

already low-priced independent retail competitors, by providing no services and otherwise reducing his costs. (Tr. III, pp. 43, 44). However, he introduced no evidence to show either that his costs were in fact lower than his competitors or that somehow he alone could have operated with retail prices one to two cents less than everyone else. Moreover, Malcolm acknowledged that in the markets in which his stations were located he was not the only discounter and indeed often exerted no impact whatsoever on his competitors' pricing. (Tr. XVIII, pp. 50-51).

In August 1972, Malcolm got into a dispute with his gasoline supplier about a bill of almost $30,000 that he had not paid for gasoline previously sold to him by an affiliated supplier. (Tr. IV, pp. 51, 55; XV, pp. 85-86). Although Malcolm had the financial capability to defray this entire debt (Tr. III, p. 86), he refused repeated requests to pay any or all of it. As a consequence, on or about August 31, 1972 he lost his source of supply. (Tr. III, pp. 84-85, 114-115; IV, p. 55).

Two days later, on September 2nd, Malcolm mailed identical letters to his service station lessors, several governmental officials, and three of the former defendants in this action stating his decision to "close all of my gasoline stations" and that "[m]y attorneys will soon announce my plans to file civil and criminal [antitrust] actions" against his current suppliers and "others who will soon be named." (CCP Exh. 54). Malcolm testified, furthermore, that he considered himself to be out of the gasoline business at the time that he sent these letters. (Tr. III, p. 103).

Following this announcement, Malcolm permitted most of his stations to run out of gasoline during September without requesting product from another supplier. After consulting with antitrust counsel, however, Malcolm first called some of petitioners and former defendants after

September 29th purportedly to seek an alternative gasoline supply. (Tr. III, p. 70; IV, pp. 57a-58, 74-76, 80-82, 86; MOC Exh. 83). He was unable to secure product,[5] and closed his remaining stations as they depleted their respective supplies of gasoline. (Tr. III, p. 85). Malcolm then proceeded to sue virtually every supplier that he had contacted.

Pretrial discovery was extensive and prolonged. Throughout this four-year period, both the district court and petitioners consistently questioned Malcolm's failure to come forward with a coherent theory of antitrust injury, much less with any credible evidence of the requisite causation and amount of damages. (H. Tr. II, pretrial conference, 11-1-74, at 8; H. Tr. IV, pretrial conference, 2-14-77, at 33; H. Tr. V, pretrial conference, 4-27-77, at 8).

Less than a month before trial, Malcolm submitted his ostensible damage report. (R. 1958-2297). It was deficient as a matter of law and petitioners immediately moved for dismissal or, in the alternative, summary judgment on the price fixing claim and concurrently pointed out the critical flaws in Malcolm's proffered proof of refusal to deal damages. (R. 2298-2314, 2329-32). The district court elected to carry this motion until trial, but again reminded Malcolm that "a strong and adequate foundation at trial will be required before any of the summaries of damages will be submitted to the jury or even mentioned to the jury." (R. 2348).

Notwithstanding these clear and repeated warnings, Malcolm made no effort during trial to cure the deficiencies in his purported proof of damages, and even chose not to call the expert witness he had retained more than two

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5. Each petitioner asserted throughout this litigation that it was unable to sell gasoline to Malcolm because of its own internal difficulties in maintaining supply to its existing customers.

years earlier to try to establish causation and amount of damages. (R. 1958-59). When petitioners vigorously challenged the sufficiency of Malcolm's damage presentation at the end of the second week of trial, the district court invited him to retake the stand to try to salvage his case: "I'm just giving you an opportunity to make out your case. This is your last opportunity, so you'd better put him up." (Tr. XVIII, p. 1). Malcolm did testify further, but neither he nor any of his other witnesses furnished any basis on which the jury could rationally determine whether or to what extent he had been proximately damaged by petitioners' alleged wrongdoing.

Confronted with this failure of proof following four years of voluminous discovery, numerous judicial admonitions, and eleven days of trial, including Malcolm's own last-ditch effort to overcome his evidentiary problems, on June 21, 1977 the district court granted petitioners' motion for a directed verdict "on the fact of injury and on the proof of damage, that is the amount of damages, both as to price-fixing and as to the loss of future profits." (Tr. XXI, p. 16). Put simply, it found that Malcolm offered neither any evidence that defendants' alleged misconduct had any adverse impact on his business nor a means by which the jury could attempt to measure the extent of his alleged injury without resorting to sheer speculation and guesswork. (Tr. XXI *passim*).

The district court did not rule on whether Malcolm had made out his claim of antitrust violation[6] but instead concluded that, even if such a retail price fixing scheme existed, Malcolm did not show that he was in any way

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6. In the trial court petitioners staunchly denied participation in any alleged unlawful conspiracy and strongly contested Malcolm's purported proof of antitrust violation. *See* note 5 *supra*. The district court granted petitioners' motion for a directed verdict shortly after they began to present their defense.

injured by it. In reaching this decision the district court nevertheless recognized that "antitrust plaintiffs are not held to the same precise standard of proof [of damages] . . . as other plaintiffs are held" (Tr. XXI, p. 2), and that "[t]here is obviously a greater latitude presented or permitted . . . to the plaintiff [to show damages] in an antitrust case." (Tr. XXI, p. 7). Thus, "[w]e don't require in an antitrust case that you compute everything as you would in a day to day business" (Tr. XXI, p. 25), and "if illegal conduct keeps you from proving your damages, we apply [even] a looser standard." (Tr. XXI, p. 24). On the other hand, the district court emphasized that illegal conduct did not prevent Malcolm from coming forward with evidence of causation or of amount of damages. (Tr. XXI, p. 24). In short, it held that, "based on the state of [the] record, the jury would have [been required] to totally speculate to come up with any figures, not only from a profit standpoint but just from a cause standpoint." (Tr. XXI, p. 15).

On appeal, the appellate court reversed and remanded the order of the district court in its entirety. 642 F.2d 845 (5th Cir. 1981). The court of appeals rested its decision on two critical misconceptions of the record. First, it unilaterally transformed the litigation from a retail price fixing/concerted refusal to deal suit under section 1 of the Sherman Act into a case of attempted monopolization through predatory pricing in violation of section 2. *See* note 3 *supra*. "Assuming the existence of [such] predatory pricing," the appellate court reasoned, "Malcolm should encounter relatively less difficulty in proving an antitrust injury resulting from unlawful conduct of this sort." 642 F.2d at 855. Second, the court of appeals expanded petitioners' assumption of violation for purposes of appeal into a broad concession that Malcolm had established "a conspiracy to injure [his] business by concerted low

pricing among his retail competitors who were pushed into this action by their suppliers, including [petitioners]." 642 F.2d at 849. Like the district court, petitioners merely assumed that Malcolm had proven a retail price fixing conspiracy and focused directly on his failure to show either fact of injury or amount of damages. Neither the district court nor petitioners assumed that the alleged retail price fixing scheme was "enforced" by "predatory pricing," let alone that it was aimed at Malcolm, and the appellate court therefore clearly erred in stating otherwise.

Petitioners asked the court of appeals for rehearing in light of these two fundamental errors at the heart of its decision. As mentioned above, *see* note 3 *supra*, the appellate court undertook to "rectify" petitioners' "misunderstanding" of its opinion by remanding to the district court the issue of whether "Malcolm's allegations of price cutting are more properly cognizable under § 1 or § 2 of the Sherman Act." 651 F.2d at 1016. This seeming withdrawal of reliance on section 2 is inconsistent with the earlier express acknowledgment of the court of appeals that "[on] this appeal [Malcolm], is greatly aided by our assumption that he proved the substantive [section 2] violation alleged." 642 F.2d at 854 n.17. More importantly, the appellate court completely failed to address petitioners' objection to its mischaracterization of their assumption of violation for purposes of appeal. Rather, the court of appeals merely cited the recent decision of this Court in *J. Truett Payne Co. v. Chrysler Motors Corp.*, ... U.S. ....., 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981), which was handed down subsequent to the original opinion below, as apparently absolving any errors it may have made since the district court had not ruled on the question of violation. *See* 651 F.2d at 1016 & n.1. This interpretation of *Truett Payne* was confirmed, moreover, by the former Fifth Circuit's companion holding in *Jot-Em-Down Store (JEDS)*

Inc. v. Cotter & Co., 651 F.2d 245 (5th Cir. 1981) (attached hereto as Appendix E), that

> [w]e are *required* by the Supreme Court decision in *J. Truett Payne* to determine the sufficiency of the evidence to support a finding of antitrust violations before assessing injury in fact and quantum of damages.
>
> . . . .
>
> Like the Supreme Court, we are unable to review the district court's direction of a verdict absent a finding regarding the alleged antitrust violations. *Only after such a finding is made, can this Court, or the district court, assess both that conclusion and the sufficiency of the proof of damages.* (emphasis added, citation omitted).

Id. 246, 248.[7]

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7. The Court of Appeals for the Eleventh Circuit has announced that decisions of the former Fifth Circuit will be binding in the Eleventh Circuit unless and until overturned by the Eleventh Circuit en banc. *Bonner v. City of Prichard*, No. 81-7005 (11th Cir. Oct. 2, 1981).

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals Seriously Misconstrues This Court's Holding in Truett Payne and Is Totally at Odds With Settled Antitrust Principles

It is axiomatic that an antitrust plaintiff seeking to recover treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), must prove (1) a violation of the antitrust laws by defendants; (2) an injury to his business or property resulting from defendants' wrongful actions (causation or "fact of injury"); and (3) reasonable proof of the amount of damage done. *E.g., Wilder Enterprises, Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1139 n.1 (4th Cir. 1980); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1270-71 (8th Cir.), *cert. denied*, ... U.S. ....., 101 S.Ct. 787 (1980); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974). Each of these three elements is equally indispensable to establishing a prima facie claim for treble damages, and failure to show any of them, including causation and amount of damages, precludes recovery. *E.g., Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255-56 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3893 (U.S. June 1, 1981); *Foremost-McKesson, Inc. v. Instrumentation Laboratory, Inc.*, 527 F.2d 417, 418-20 (5th Cir. 1976); *Pogue v. International Industries, Inc.*, 524 F.2d 342, 344-45 (6th Cir. 1975). Indeed, the former Fifth Circuit itself had previously cautioned its district courts against expending judicial resources to consider whether an antitrust plaintiff had adduced sufficient evidence of violation where a directed verdict is granted for lack of proof of fact or amount of damages. *See Cinema-Tex Enterprises, Inc. v. Santikos Theaters, Inc.*, 535 F.2d 932, 933 (5th Cir. 1976).

The court of appeals plainly erred in explicitly reading *Truett Payne* in *Jot-Em-Down Store*, and by implication in the opinion below, to impose an absolute prohibition against directing a verdict in any antitrust case for insufficient evidence of causation or damages "absent a finding regarding the alleged antitrust violation." 651 F.2d at 248; *see* 651 F.2d at 1016 n.1. This Court simply pointed out that a verdict should not be directed against an antitrust plaintiff for failure to make the requisite demonstration of fact or amount of damages without first considering the possible application of the "relaxed" damage rules available in instances of proven misconduct by defendant. Where, as here, the district court assumed that plaintiff had established a prima facie antitrust violation, indulged him every conceivable benefit of even the most lenient set of damages rules, and still found his evidence of causation and amount of damages to be inadequate, neither *Truett Payne* nor any principle of antitrust law or policy compels the trial judge to make a determination of culpability before directing a verdict on the issue of damages. In fact, in *Truett Payne* this Court underscored its holding in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), that section 4 of the Clayton Act requires *independent proof* of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," *id.* at 489 (emphasis in original, by unanimously rejecting any rule of "automatic" damages in price discrimination cases under section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976). *See* 68 L.Ed.2d at 48.

In sum, the opinion below substantially misconstrues this Court's decision in *Truett Payne* and potentially threatens to rearrange the framework of all private treble damage litigation. This situation calls for immediate corrective action by this Court.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari to the Eleventh Circuit ought to be granted, the decision of the Fifth Circuit Unit B reversed, and the judgment of the district court reinstated in full.

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APPENDIX

APPENDIX A

[¶ 61,547] Patrick A. Malcolm v. Stone's Independent Oil Co., et al.

U. S. District Court, Middle District of Georgia, Albany, Division, C. A. No. 1236-Alb. Dated June 21, 1977. Ruling of the Court on motions for directed verdict.

Sherman Act

Private Suits—Injury to Business or Property—Service Station Operations—Conspiracy to Prevent Price Cutting—Failure to Prove Injury.—A service station operator failed to prove that he was injured by an alleged conspiracy among his suppliers and competitors to prevent him from running a discount operation. There was no evidence that his decision to quit business was caused by the alleged scheme. It appeared that the operator owed $30,000 for gasoline purchases, and there was no evidence that he could not have gotten further supplies if he had paid this debt. Moreover, there was no evidence that other suppliers were not available; as long as the operator could buy supplies from somebody else at the same price, he could not have been injured by his suppliers' alleged refusal to deal with him. Furthermore, there was insufficient evidence to show the extent of any damage to the operator or the effect that the alleged scheme had had on the operator's selling prices. See ¶ 9026.86.

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Transcript

Jury Not Present

Owens, J.:

The Court: All right, ladies and gentlemen, following the motions that were made and your argument, the Court reviewed Mr. Malcolm's entire testimony as transcribed by the court reporter because in the Court's best judgment the only evidence that the plaintiff has produced as to fact of injury is the testimony of Mr. Malcolm. And almost all of the evidence produced, assuming the fact of injury as to ascertainable damages is the testimony of Mr. Malcolm.

Of course the motion as for a directed verdict, the standard for the Court's consideration is as set forth in *Boeing Company v. Shipman*. The Court basically is called upon to decide whether or not there is a conflict in substantial evidence to create a jury question. A mere scintilla of evidence, that case reminds us, is insufficient to present a question for the jury.

Mr. Malcolm comes into Court alleging a conspiracy in which each of the defendants participated. He alleges

that that conspiracy was generally one to control prices, both at the wholesale and the retail level. The evidence does show that retail is affected by wholesale and wholesale by retail, so if there be a conspiracy it obviously would have to be in toto.

He says that that conspiracy being in existence that he tried to come into the market as a price-cutter and that due to the conspiracy that he was prevented from time to time from operating one to two cents below everybody else. He doesn't say always. The evidence shows at best from time to time. He says to the Court through his lawyers in argument that that caused him to make less money than he would have otherwise made, and he says that it ultimately resulted in his no longer being able to secure a supply of gasoline.

Of course the burden is upon him to show not only that there was a conspiracy and that these defendants were members, but that that conspiracy in fact injured him in an amount that is reasonably ascertainable from the evidence that is produced.

Of course the courts recognize, principally in *Bigelow* and *Lehrman* that antitrust plaintiffs are not held to the same precise standard of proof as far as lost profits, the value of a going business, as other plaintiffs are held. Nevertheless, evidence must be produced which is not speculative and which presents some reasonable basis for a jury to make some conclusion.

Looking towards the tail end of this problem first and looking at Mr. Malcolm's own testimony, in the spring of 1972 Mr. Malcolm was being supplied by two wholesalers, Hi-Octane and Stone's. He vacillated back and forth between the two of them, at one time giving Hi-Octane written notice that he was going to prefer

Stone's because Stone's had offered him some arrangements that Hi-Octane had not offered him; nevertheless, he still continued to do business with both of them up to a point. It seems though that in June, at the time that he had a fire at his Hawkinsville station that his entire supply was then coming from Hi-Octane. He had a fire on June 15. He says generally that fire was caused by whoever delivered the gasoline to that station, letting the gas either spill out on the ground and be ignited by a cigarette smoked by the employee of the deliverer or the cigarette dropped into the tank. Nevertheless he says it was caused by whoever delivered the gasoline. He tells us no more about that other than five automobiles were burned, the station was completely destroyed. He continued to do business for thirty days with that wholesale company, and then ceased. We don't know why he ceased. He doesn't tell us that. The only fact that he produces that the Court has been able to find is an entry on the books produced by his accountant which shows that he carried as a receivable some $4500 which he claims was owed by Hi-Octane for the gasoline that burned. At the time he says he owed Hi-Octane $30,000. He does not offer an explanation as to why he had never paid the $30,000. He doesn't tell us that the value of whatever burned exceeded the amount that he owed Hi-Octane. No figures whatsoever. The Court would assume that if a figure was ascertainable that it would have been carried on his books as a receivable. He has no figure.

So around July 15, he then switches back to the supplier he had been using, Stone's. He buys from Stone's according to his testimony, until a few days after the first day of August, and there is then mentioned to him by Mr. Kaiser, the salesman for Stone's, that Stone's is concerned because of the non-payment of the $30,000 to Hi-Octane. Mr. Malcolm doesn't tell us that there is

any mention of the then pending acquisition of Hi-Octane by Stone's, but since shortly thereafter the evidence indicates that acquisition was completed it naturally follows, there being no other evidence, that that was the reason that it was mentioned. But be that as it may, Mr. Malcolm is told that he is going to be called upon to come up with the $30,000. There were a number of conversations about the $30,000. He goes, in fact, to the company office and discusses that situation. In fact those conversations were first around August 4, next around August 11, 12 or the 13th, further conversations. On the 17 or 18th, subsequent to being told he had to pay the $30,000 he was assured he would have a supplier of gasoline by Mr. Garland. That's what he tells us. During those discussions it was even offered that he could go to work for Stone's, and then, as indicated, at the first of August he was told on the 31st that he could have no more gasoline unless he paid the $30,000.

[*Lack of Attempt to Purchase*]

Mr. Malcolm says at that time he could have paid that $30,000. He told us about the cashier's checks he had in his safety deposit box, approximating $100,000 at one time. But he says he chose not to pay it. He waited after that, according to his own testimony till at least September 29 before calling anybody who is connected with this lawsuit to secure other product. Of course in the meantime on September 2 he has written a very plain letter saying he is going out of business, and he tells Stone's I am going to sue you for violating the antitrust law. He never attempted to get any more product from Stone's.

There is not a scintilla of evidence in this case that he could not have gotten further product from Stone's had he paid what he said he could then pay.

Now for Mr. Malcolm to create a jury issue showing that the conduct of these defendants, assuming it to be illegal, caused him injury, he has got to come up with evidence which would so say. Just like we tell a jury in a negligence case, talking about proximate cause, it matters not how negligent any defendant is unless that negligence creates injury to the plaintiff. So it matters not how illegal the conduct of these defendants was unless it was that conduct that created the injury that Mr. Malcolm comes into Court alleging.

In the Court's best judgment, this jury just doesn't have any evidence to base a conclusion upon that be there a price-fixing scheme that that is what resulted in Mr. Malcolm's ceasing to do business. They can speculate; they can say we don't like price-fixing; we don't like what Mr. Malcolm said was going on in the market. But they couldn't say, in the Court's best judgment, because there is no evidence, that that is what put Mr. Malcolm out of business.

[*Other Sources of Supply*]

Of course there are other failures of proof. Not only does Mr. Malcolm fail to show any thread between this illegal conduct and his going out of business, and failure to get product. He doesn't tell the jury about the general unavailability of product. He enumerates a number of people he knew of who were selling gasoline that he never called—specifically Triangle, with whom he had had previous contact. That's his own testimony. I guess the jury could speculate as to whether or not Triangle would have sold him; could speculate that he would not have sold him. But we can't speculate.

If these four defendants are just a part of the market the fact that they won't sell Mr. Malcolm when other

people would could [sic] not injure Mr. Malcolm on a refusal to deal. He may not like the fact that they didn't sell him, but as long as he can buy his product from somebody else at the same price, he could not be injured from their refusal.

[*Damages*]

Of course even assuming that he got beyond the hurdle and let me point out that I am not attempting to summarize this entire record. If I had about a week to fly-speck the record again and write it all out I would do so. So what I am saying is not intended to cover the whole situation but to give you my overall impression of this case. Even if Mr. Malcolm could establish that there was some thread between the conduct of the defendants and his ceasing to do business, his next burden would be to produce to the jury evidence showing how he was damaged.

There is obviously a greater latitude presented or permitted is a better word, to the plaintiff in an antitrust case. He still, however, may not call upon a jury to speculate. The defendants have suggested that there has got to be some yardstick that a jury can go by. The very case, one of the cases that the plaintiff called to the Court's attention this morning demonstrates that very principle—*Bray v. Safeway Stores, Inc.* [1975-1 TRADE CASES ¶ 60,193], 392 F. Supp. 851. That was an action where cattlemen were alleging that they were not able to sell their beef at wholesale for a fair price because of the illegal conduct of Safeco and other large stores, A & P and others. Look at page 864. The Court pointed out that the jury had before it evidence that between 1953 and 1970 the price received by the cattleman for his cattle remained relatively constant, between 20¢ and 28¢ a pound. Between 1970 and 1973, a time period the conspiracy was allegedly in-

operative, the price of beef skyrocketed to 43¢ a pound. The jury apparently concluded that had the conspiracy not been in effect in 1964-1967 a similar increase of approximately 20¢ per pound would have occurred. The 20¢ figure is undoubtedly an average. So you can use averages.

But here there was something to base an average upon.

In this case Mr. Malcolm just comes in and produces his books and his records. He himself does not testify one iota about those. He admits that during the period of time he operated his filling stations he didn't know whether he was making a profit or a loss until he filled out his income tax returns. He doesn't say that he thinks he would have continued in business; he doesn't tell us anything about his business. He doesn't explain why during the months of June, July and August his profit was higher than it had been in the past. He leaves that to the jury to conclude, using their common sense. Jurors can't use common sense on market facts, gentlemen. We let them use common sense in wrongful death cases, because we are all acquainted with life. We are living human beings. If anybody knows about life, it's we human beings. We are looking at a fellow human being. But the average person doesn't know anything about the filling station business. How can they conclude that Mr. Malcolm's business would have stayed in being for sixty days or six months? The fact that he has got a lease agreement doesn't guarantee that he will stay in business. He closed up a lot of his businesses pretty quick—Macon, being a principal one. But who knows?

You know, the Court did kind of call this to Mr. Malcolm's attention. Mr. Malcolm came back to testify for almost a hundred pages and he has yet to opine about

any of this, even though I think that could he so opine that the law would permit him, as a person who operated a chain of filling stations over a period of time to do that. Another yardstick, of course, would be go get somebody else who was in the business who sold some 400 thousand gallons or 283, or whatever period it was, to tell these ladies and gentlemen of the jury that being in a similar business, looking at the market, seeing how Mr. Malcolm operated, in my best judgment he would have been successful in the future, the public would have bought and the trend indicated he was going up and you ladies and gentlemen of the jury I suggest to you that you could find, and it is my opinion that his business would have continued. But we don't have any evidence on that. We leave the jury, in the Court's best judgment, to sheer speculation as to the future.

The cases that you gentlemen have all pointed out to the Court condemn such speculation, particularly the *Adolph Coors* [1975-1 TRADE CASES ¶ 60,128], case at 506 F. 2d, page 934, where they had an expert to speculate.

But anyway, in the Court's best judgment, as far as fact of injury, and some reasonable basis for calculation of damages on going out of the business, there's nothing to go to the jury.

[*Effect on Prices*]

On price-fixing, on the fact of damage, Mr. Malcolm's testimony is wholly in generalities. He tells us of telephone conversations, of being urged to go down—no, not go down, go up in prices. But everytime he told us of a telephone conversation where somebody who allegedly is a part of this conspiracy, urged him to go up, he never told us what he did. He never told us what the effect of the conspiracy was on him. He can't be damaged if

it didn't have some effect on him, even if it existed. There's got to be more than a phone call; there's got to be more than an urging on the part of competitors, even if they are urging by agreement, for Mr. Malcolm to go up in his price. He gives us the high points but never gets down to telling us what happened. Of course, nothing may have happened. Sounds like he told all that he knew, in the Court's best judgment.

Then on cross examination he admits that during the year '71 and '72, while on his direct examination he told us that every competitor dropped the price, now he says, no, in '71 and '72 every competitor didn't drop his price when I dropped mine. He admits that not once but twice, and in great detail. Now if every competitor—he doesn't ever specify who every competitor is, but assuming it to be the defendants, if the defendants didn't go down in concert, then where is the cause and effect of the conspiracy.

On cross examination when he tells us that particular markets, he tells us, for instance, Macon, that when he opened up his station the prices did not go down. He tells us in Warner Robins, when asked about detail, yes, a man nearby who operated a Diamond station went down.

Everytime he wants to tell us in particular about a particular location I look at his damage figures and yellow pads, and there are no figures about that.

Of course it's obviously difficult to prove the fact of damages, but Congress didn't say when you can't prove it you can collect. If there's a violation of the law and damages cannot be proved then it becomes the responsibility of the Department of Justice and they can, as I hear they may be doing, can look into this situation on the criminal and the civil side. They can seek an in-

junction to stop illegal conduct. It doesn't have to injure Mr. Malcolm. They can also indict the members of the conspiracy. So Congress has devised some means of stopping illegal conduct. But they haven't said that a private plaintiff can come into Court just because there be illegal conduct and collect damages.

Of course the problem is the same as it was when the case began, when we started discussing damages on many occasions. Mr. Malcolm says he wanted to operate one or two cents below everyone else. Of course he has no right to operate one or two cents below everybody else. He can certainly try. Congress didn't put a fence around the gasoline business and say Mr. Malcolm you can carve out one or two cents below and stay there and everybody else can't bother you. Congress has said you can't team up on Mr. Malcolm because of that. But the evidence doesn't show that competition teamed up on Mr. Malcolm. If you look at his own price calculations, his own testimony at best, for limited periods of time when he went down others went down. But it didn't remain that way. How can a jury conclude that because, for instance when Colonial opened up a new station that they went down for two weeks at the time of opening that station and then came back up that that was conduct on account of the conspiracy? How can the jury conclude that just because anybody went down in price at the time Mr. Malcolm went down that that was caused by the conspiracy? That's sheer guesswork.

Of course Mr. Malcolm tells us when he went down his volume always increased. Yet he would have us believe on his damage calculation that it would have worked just in reverse; that he would have gotten more money. His damage theory is totally inconsistent with his means of operating, as I view the situation.

Now let's particularly look at Macon. He says he opened in July of 1971 and Mr. Norwood said the town would spot me if I took my signs down. The signs he is referring to are those billboard type signs showing what his price is. He doesn't tell us what to "spot me" means. He took his price signs down. He doesn't tell us what happened. Did the prices go up? Did they go down? What happened to his prices? What was the effect on his business? What was the effect on the market? What's the jury to conclude?

He says Mr. Hutchinson of Hi-Octane called, says Mr. Hutchinson told him he was pressured by Roy Cross to get prices up in Macon, would consider it a personal favor if I would cooperate. And he says over a period time I changed the prices. He doesn't tell us whether he changed his prices up or he changed them down. He doesn't tell us what happened. We did have prices for that station. His average calculations show that in the month of August his price was 28.6. How can he be damaged there?

Then he says Mr. Norwood also called me—if I didn't go up he would guarantee that they were going to go back down. Of course those same figures show he didn't go down. His average price remained right there.

There's a lot of conversation about Mr. Darsey calling him and yet over there somebody asked him about whether Mr. Darsey had ever gone down below him in Albany, and he said, oh no, Mr. Darsey never went down below me.

He talks about Mr. Darsey, though, passing on the word, says that if I would go up over Hawkinsville that Buddy NeSmith Oil Company and Ace Oil Company and Dean's Oil Company would go up.

He talks about prices being 23.9, but we never hear any more about that. What happened? What effect did that have?

He tells us about Tifton. Says when he got ready to open Tifton he advertised in the paper what his price was going to be. He tells us, having advertised, he looked around and everybody else was coming down. Of course we don't know who everybody is. We don't have any figures. He says prices went down below cost everywhere I had a location, and having said that then in cross examination he says, no, during '71 and '72 every competitor didn't go down. How is the jury going to conclude who went down? And why they went down? Just on the word "everybody." You can't prove a conspiracy by saying everybody did it, gentlemen.

All right, talking about Thomasville—no figures about Thomasville.

That illustrates the fact, gentlemen, that in the Court's best judgment there is just a total absence of any specific evidence showing what effect, if any, this illegal conduct had on Mr. Malcolm. I assume Mr. Malcolm wasn't in position to testify that but for the illegal conduct he would have made more money than he did. He didn't try to. There was just no more evidence available. Of course it's understandable because Mr. Malcolm just didn't keep adequate records. You can keep records on any kind of paper you want to—it doesn't matter what the form is. But you've got to have records of some type to be able to give to the jury so that they can come up with some kind of mathematical computation. Frankly, I think based on the state of this record, the jury would have to totally speculate to be able to come up with any figures, not only from a profit standpoint but just from a cause standpoint.

Those remarks just hit the surface. In the Court's best judgment, Mr. Malcolm failed, both from the fact of damage and from fact of injury and the calculation of damages.

[*Fact of Conspiracy*]

I have not fly-specked the record to consider the motion from the standpoint of proof of a conspiracy, and I am not in any way indicating at this time that the Court would grant a motion on that basis, or would not. I would want to review the record very carefully before making such a ruling. But I am convinced that the motion should be granted as to all defendants' motions on the fact of injury and on the proof of damage, that is the amount of damages, both as to price-fixing and as to the loss of future profits.

So accordingly, the motion is granted as to both.

Mr. Marshal, will you bring the jury in so I can explain that to them.

[Statement to the jury not reproduced.—CCH.]

APPENDIX B

Patrick A. MALCOLM d/b/a Spar Oil Company and Spar Oil Company of Georgia, a Corporation, Plaintiffs-Appellants,

v.

MARATHON OIL COMPANY, Crown Central Petroleum Corporation, Tenneco Oil Company et al., Defendants-Appellees.

No. 77-2515.
United States Court of Appeals,
Fifth Circuit.
Unit B

April 17, 1981.

Rehearing Denied July 27, 1981.

Independent gasoline retailer brought action against gasoline wholesalers alleging antitrust violations. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., J., directed a verdict in in favor of the wholesalers, and the retailer appealed. The Court of Appeals, Tuttle, Circuit Judge, held that the independent gasoline retailer produced sufficient evidence to create jury issues on fact of injury and amount of damages resulting from gasoline wholesalers' alleged predatory pricing and refusal to deal conspiracy.

Reversed and remanded.

1. Monopolies (Key) 28(8)

In action by independent gasoline retailer against gasoline wholesalers alleging antitrust violations, the independent gasoline retailer produced sufficient evidence to create jury issues on fact of injury and amount of dam-

ages resulting from the gasoline wholesalers' alleged predatory pricing and refusal to deal conspiracy.

2. Monopolies (Key) 28(1.4)

Private plaintiff proceeding under Clayton Act must prove a violation of the antitrust laws, cognizable injury attributable to the violation, and at least the approximate amount of the damage. Clayton Act, § 4, 15 U.S.C.A. § 15.

3. Monopolies (Key) 17(1.8, 2.9)

Trade Regulation (Key) 914

Predatory pricing violates the Sherman Act when there is an attempt to monopolize, the Clayton Act when the predation includes price discrimination, and the Robinson-Patman Act under any circumstances. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2; Clayton Act, § 2 as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13; Robinson-Patman Price Discrimination Act, § 3, 15 U.S.C.A. § 13a.

4. Trade Regulation (Key) 927

Private right of action does not lie for a violation of the Robinson-Patman Act. Robinson-Patman Price Discrimination Act, § 3, 15 U.S.C.A. § 13a.

5. Monopolies (Key) 28(1.6)

Sherman Act may be used by private plaintiffs who suffer a violation of the Act by predatory pricing. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

6. Monopolies (Key) 28(7.2)

Antitrust plaintiff's burden of proving the amount of damages is lighter than the burden of proving injury in fact; the amount of damage may be shown by just and

reasonable inferences with juries voting upon the probable and inferential as well as upon direct and positive proof.

7. Monopolies (Key) 28(7.3)

Given proof of the fact of damage, proof of losses which borders on the speculative is allowed in order to facilitate the policy of the antitrust laws.

8. Monopolies (Key) 28(7.6)

Nonexpert's testimony regarding past sales volume and profit margin may be used to measure damages in an antitrust case.

9. Monopolies (Key) 17(2.1)

Unilateral refusal to deal does not constitute an antitrust violation.

10. Monopolies (Key) 17(2.1)

Poor credit may constitute a defendant's proof that a refusal to deal was unilateral rather than a conspiratorial decision so that such refusal does not constitute antitrust violation.

11. Monopolies (Key) 28(9)

Plaintiff need not retain possession of a business oppressed by antitrust violation until the business is bankrupt or directly shut down by the violator; rather, he may voluntarily close his business and still collect future lost profits if he can show that the defendants' antitrust violations forced him out of business.

12. Monopolies (Key) 28(1.2, 7.2)

In a refusal-to-deal case, a plaintiff who bypasses an obviously adequate alternative supplier should not recover for the loss of his business; however, a plaintiff, seeking to recover damages because of an unlawful refusal to deal, need not show a lack of an alternative remedy.

13. Monopolies (Key) 28(9)

Antitrust victim must seek to minimize the amount of his damages.

14. Monopolies (Key) 28(7.6)

In action by independent gasoline retailer against gasoline wholesalers alleging antitrust violations, wholesalers did not prove a failure to mitigate damages on the part of the independent gasoline retailer, since they did no more than establish that the independent gasoline retailer failed to contact a few known suppliers of gasoline and they did not establish that such dealers could or would have sold the independent gasoline retailer the needed product in sufficient quantities to keep his business alive.

15. Monopolies (Key) 28(7.6)

In action by independent gasoline retailer against gasoline wholesalers alleging antitrust violations, even if the independent gasoline retailer had the burden to show the reasonableness of his mitigation efforts, he met such burden by introducing evidence of his efforts to obtain alternative suppliers of gasoline.

David R. Aufdenspring, Gary G. Grindler, Atlanta, Ga., for plaintiffs-appellants.

Trammell E. Vickery, John C. Butters, Atlanta, Ga., for Tenneco Oil Co.

Charles L. Gowen, Joseph R. Gladden, Jr., Michael Eric Ross, Atlanta, Ga., for Marathon Oil Co.

Morton A. Sacks, Baltimore, Md., for Crown Central.

Charles Rippin, Edward T. Brennan, Savannah, Ga., for Colonial Oil Ind.

Appeal from the United States District Court for the Middle District of Georgia.

Before GODBOLD, Chief Judge, TUTTLE and HILL, Circuit Judges.

TUTTLE, Circuit Judge:

Patrick Malcolm's former occupation qualifies him as a member of a vanishing breed. From 1965 to 1972 he was an independent gasoline retailer who participated in price wars in south Georgia. By 1972 he had 17 stations and plans for further expansion.

Independent gasoline retailers are considered to be mavericks by major brand wholesalers and retailers, because independents post consistently lower prices than major brand retailers. But even among independent retail businesses Malcolm's operation was unusual. Malcolm's "pricing was the key to [his] business." He sought to charge one to two cents per gallon below the price set by other independents. In order to succeed in this marketing strategy Malcolm cut every conceivable expense. He invested little capital in his stations and offered few of the services found at other stations.

Malcolm's career as a gasoline retailer ended in 1972. In August, his last supplier refused to sell him additional gasoline. Malcolm failed to locate a substitute supplier. In September and October of that year his stations exhausted their gasoline supplies. As a result Malcolm's retail gasoline business abruptly concluded in a manner resembling the demise of many other independent gasoline retailers.

Malcolm, however, did not retire quietly. Even before the exhaustion of his gasoline supplies Malcolm considered filing a lawsuit. Shortly after the closing of his business

he acted on those plans. On March 14, 1973 he filed a complaint alleging federal antitrust violations by numerous entities including the five present defendants.

Malcolm believed that powerful interests in the gasoline industry desired and achieved his demise. The defendants, predominately marketers of gasoline, had favored relatively high retail prices of gasoline because high retail prices ensured higher wholesale prices and greater profits at all levels of the distribution chain.[1] Malcolm reasoned that his "price cutting" in the retail market disturbed these defendants and others. He then found evidence of communication among the members of the gasoline industry. In discerning a conspiracy from these facts Malcolm apparently adopted the view of Adam Smith who wrote that: "People of the same trade seldom meet together, even for merriment or diversion but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, The Wealth of Nations 232 (Pelican reprint 1980). This conspiracy which disliked pricecutters, Malcolm alleged, took retaliatory actions against him that violated the antitrust laws in two respects. First he claimed that while he was still in business the defendants conspired to influence the retail market by causing his competitors to drop their prices below his costs. Second, when this first tactic did not drive him from the market, the defendants, Malcolm claimed, conspired with all gasoline suppliers to refuse to sell him gasoline for his stations. For these two alleged antitrust violations Malcolm sought monetary damages.

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1. Four defendants, Marathon, Tenneco, Crown Central, and Colonial Oil Industries sold gasoline at various marketing levels. The fifth defendant, Georgia Independent Oilmen's Association, did not sell gasoline, but was accused by Malcolm of facilitating the price fixing and predatory pricing that Malcolm accused the other defendants of implementing.

Malcolm did not succeed in the district court. That court directed a verdict against Malcolm on both counts for two reasons. With respect to each alleged violation the court found that Malcolm had presented insufficient evidence on the fact of injury and the amount of damages. In appealing this ruling Malcolm contends that he did introduce substantial evidence on these questions and that the district court erred in directing a verdict on those grounds.

[1] This Court will limit the scope of its review of this case. The district court ruled the plaintiff's evidence was insufficient only on the issues of injury in fact and amount of damages. That court issued no ruling on whether the defendants violated the antitrust laws. The parties have not fully addressed the alleged conspiracy and substantive violations and, in fact, counsel on both sides agreed in oral argument that because of the scope of the trial court's ruling, this Court must assume that the violations did occur. Thus, this Court will assume that Malcolm sufficiently alleged and proved actions in violation of the antitrust laws and generally will seek only to answer the question: "Given the alleged violations of the antitrust laws, did the plaintiff show substantial evidence of injury and amount of damages?" Upon completion of this review, we believe that the district court erred in ruling that Malcolm introduced insufficient evidence of injury in fact and amount of damages on both claims for antitrust damages.

I. *Statement of Facts—The Plaintiff's Evidence*

This Court must focus on the plaintiff's evidence. To avoid a directed verdict, Malcolm must have presented sufficient evidence to create a jury question with respect to each element of his case. As plaintiff, he must introduce what this Court has called "substantial evidence to

create a jury question." *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc). Substantial evidence constitutes "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Id.* at 374. The Court, however, should view all the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Id.* Thus, this Court must consider all evidence in such a light, and all statements in this opinion reflect that requirement.

This posture of the case requires that the facts be set out in detail.

While Malcolm sold gasoline in certain retail markets, the defendant oil companies competed at various marketing levels within the same geographic area. In this area, the defendants operated at the wholesale level, selling gasoline to wholesalers who would sell to retailers.[2] In addition, the defendants would also supply gasoline directly to retailers in Malcolm's area. Defendant Crown Central also sold gasoline at the retail level in some cities where Malcolm had stations.

The defendants were not always directly competing with Malcolm at the retail level, but activity at the retail level concerned them. The retail prices indirectly affected the defendants' profits. When retail prices dropped the defendants' wholesale business would suffer. If the defendants' retail customers could not meet the lower prices, the defendants would lose volume. If the defendants cut wholesale prices to allow the retailers to meet low prices, and, thus, retain volume, the defendants' profits margins decreased. As a result, the defendants desired non-depressed retail markets.

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2. One defendant, Tenneco, sold gasoline to Malcolm's last supplier of gasoline. Thus, this defendant was apparently an indirect supplier of Malcolm.

The pricing practices of retailers would concern the defendants because of this interrelation of the wholesale and retail markets. Because Malcolm was known as a price-cutter who competed against other retailers of defendants' gasoline, his pricing practices would naturally draw their attention. Defendants Tenneco, Marathon and Crown Central without question recognized Malcolm as a price-cutter in the retail gasoline market. One witness stated that among independents Malcolm's stations were recognized as being among the more aggressive price-cutters.

> Although we all in the independent business are somewhat price cutters, some are more than others. And Spar [Malcolm's business] was one of a group that seemed to be more than others.

Testimony was heard that Malcolm's competitors considered his pricing practices a cause of depressed prices and discussed the chances of improving the situation. The discussion included soliciting the aid of Malcolm's last two suppliers in a campaign to persuade Malcolm to raise his prices. In addition, employees of defendant Marathon wrote memoranda indicating their belief that Malcolm's pricing practices contributed to depressed prices. Perhaps the most direct such statement by Marathon came near the end of Malcolm's career in the gasoline retail market when one Marathon employee wrote:

> Pat Malcolmb [sic] *our old marketing thorn* from Ty Ty Georgia who in the past under the Spar brand has contributed to numerous bad market conditions, has closed all his stations. (Emphasis added.)

The defendants, it may be inferred, were happy when Malcolm retired from the retail market.

Proof of unsympathetic thoughts, however, will not entitle an antitrust plaintiff to recover. An antitrust plaintiff must show that the defendants' actions violated the antitrust laws in a manner that gives him standing to sue. At trial, Malcolm attempted to show two types of violations by the defendants and others: 1) a conspiracy to injure Malcolm's business by concerted low pricing among his retail competitors who were pushed into this action by their suppliers, including the defendants; and 2) conspiracy among suppliers, including four defendants, to refuse to sell gasoline to Malcolm in order to drive him out of business. Given the parties' assumption that two violations of the laws occurred, plaintiff Malcolm on this appeal only need show injury-in-fact and amount of damages resulting from the defendants' assumed violations of the antitrust laws.

On the pricing count, Malcolm sought to show that the defendants wanted either to coerce him into raising his price to a "normal" price or to force him out of business by "persuading" competing retailers to drastically reduce their prices.[3] Malcolm first sought to show that the defendants employed pricing practices called temporary price allowances. If one of the defendants' customers faced price-cutting competition, the defendants would subsidize his cost of gas to allow him to retain his profit margin while he met the price-cutter's terms. Those favorable arrangements were available to all defendants'

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3. His records could not adequately support a claim for damages under this count at all his stations so his claim included damages for only some of his stations. Although neither side considered it important enough to brief, the record reveals that those stations were in Acree; Adel; Albany; Cordele; Cochran; Clyattsville; Macon; Moultrie; and Valdosta. Malcolm similarly limited his claim for damages to a specific time period. The record reveals that this period extended from June, 1971 to August, 1972.

retail customers except the initial price-cutter. This practice, Malcolm contended, discouraged potential price-cutters and forced active price-cutters to raise their retail prices.[4]

With this mechanism, the defendants, Malcolm alleged, were able to engage in a price-fixing conspiracy. The "normal" price was the price at which dealers could make a living. Prices below normal were depressed. Thus, the defendants and their customers desired normal prices. Such a price level could be maintained because the retailers, fearing punishment through operation of the price allowance system, would obey the "requests" of those representatives of the industry who discouraged deviation from "normal prices." The "normal" price must therefore be viewed as a generally prevailing price that in addition was enforced by the conspirators. And a price-cutter would be viewed as any retailer who set a price below "normal."

Malcolm recalled several instances where his competitors went beyond merely meeting his prices. He testified that in several instances the "price-fixing" conspiracy caused Malcolm's competitors to lower retail prices in order to punish him for his failure to enter the conspiracy and raise his prices to normal. He gave several examples of dramatic price drops in areas where his stations were located. In these instances, he testified that: a price would prevail in the market before he entered, he would enter at a price one to two cents below the prevailing price,

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4. This system would not fully explain the occasions when his competitors allegedly decreased their prices beneath his costs. This system apparently only explains drops in prices to meet Malcolm's price. Because the extent of the price drops constitute a part of the substantive violations, we need not deal with any difficulty in this part of the plaintiff's case.

and his competitors[5] would cut their prices to a level equal to or lower than his price.[6] In some of these instances, Malcolm's competitors lowered their prices beneath Malcolm's costs.[7] He stated that in the time period just before the time period for which he claimed damages the price drops below his cost often occurred simultaneously at every location where he had a station. Malcolm sought to tie these price drops to "price fixing" conspiracy through his testimony that an alleged conspirator threatened to keep retail prices down at all Malcolm's locations unless Malcolm raised his prices to normal. In addition, Malcolm testified that one of his suppliers, an alleged conspirator, revealed the conspirators' strategy by stating that:

> [T]hey just wouldn't allow [Malcolm] to sell under the market [at Thomasville] and [that Malcolm] would have to go up to the normal price [in Thomasville] in order to get the prices up everywhere.

These statements occurred prior to the damage periods. But they may still be used to show the conspirators' intent in the later period. Furthermore, Malcolm testified that one of his competitors told him that prices would soon rise but "they were going to go back down" unless Malcolm raised his prices. From this evidence Malcolm asserts

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5. Malcolm did not always specify which competitor decreased their prices. But it is clear from his testimony that the generally prevailing price in the market drastically dropped even if not all his competitors dropped their individual prices. We think this testimony was sufficiently specific to accomplish the same purpose as testimony that all his competitors dropped their prices. It is also clear that when he described these price drops he intended to convey the idea that all his competitors participated in the drops.

6. Not all of these instances were within the locations and time periods for which damages were claimed. But some were within the relevant areas and time periods.

7. *See* note 4 *supra*.

that he presented a jury issue on fact of injury resulting from the "price-fixing" conspiracy's assumed unlawful "predatory pricing" tactics.

To complete his presentation on his claims arising under the pricing practices of the price-fixing conspiracy, Malcolm sought to demonstrate the amount of damages caused by such practices. Malcolm's lawyers prepared worksheets detailing Malcolm's revenue and expense figures at nine stations which suffered depressed prices for the appropriate period. They then sought to compare the actual revenue figures with the revenue figures that would have obtained if the defendants had not caused the prices to drop and Malcolm could have followed his policy of setting his prices at one to two cents below the normal price.[8] The difference represents Malcolm's claimed "lost profits" that resulted from the conspirators' pricing practices.

Malcolm admits that his calculations are not precise. The prices admittedly varied within these periods. Malcolm's records did not include daily prices, and, thus, his comparisons are based on average monthly prices. In addition, all the calculations are based on the assumption that Malcolm would have retained the same market share if the conspiracy did not exist and normal prices prevailed.

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8. The trial court had misgivings about Malcolm's proof relating to revenues, actual or hypothetical. The trial court initially rejected the proof of the actual revenues and costs as summarized by Malcolm's lawyer, because it found Malcolm had not established the effect of the conspiracy, a prerequisite for establishing the amount of damages. The court later admitted this summary of Malcolm's revenues and expenses for this period. Malcolm originally sought to show potential revenues by introducing calculations of revenues based on purely hypothetical retail price levels. The trial court rejected the projected revenues assumed in the tendered exhibits beaus no one testified on the possibility of actually selling gasoline on the various hypothetical price levels.

When the defendants' pricing practices failed to discourage him, Malcolm alleged that they unlawfully refused to sell him gasoline, a second antitrust violation. The defendants refused to deal with the plaintiff.[9] Assuming, as we must on this appeal, that this refusal constituted an antitrust violation, Malcolm must then show that the refusal caused him injury.

Malcolm attempted to show that the defendants' refusal to deal was a material cause of his business' demise. He presented a lengthy narrative of his story concerning how he ran out of gasoline. The story began on June 15, 1972, when Malcolm's Hawkinsville station burned because of the actions of a gasoline delivery truck driver who carelessly unloaded gasoline. Malcolm waited thirty days for his gasoline supplier, Hi-Octane, to pay for the damage to his station. The supplier never acknowledged this responsibility, and Malcolm turned to another supplier. Malcolm had sufficient funds to pay off his account at Hi-Octane but he refused to pay his account apparently because of this dispute.

Malcolm's substitute supplier was Stone's. This relationship began on July 15, 1972 and encountered its first difficulty soon thereafter. On August 4, 1972, Stone's threatened to cut Malcolm off on August 15 if he did not settle his overdue account at Hi-Octane. This threat was repeated on August 11. On August 12 or 13, a representative of Stone's Malcolm testified, talked with him again and told him that he should raise his prices. Then on August 23, Stone's offered to accept Malcolm's leases and put Malcolm

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9. Tenneco did not turn Malcolm down but rather did not return Malcolm's call. Malcolm evidently claims that this failure to return his call constitutes an unlawful refusal to deal.

on Stone's payroll. Malcolm rejected this offer to "buy him out." Stone's terminated Malcolm's supply on August 31.[10]

Malcolm's business then disintegrated. From August 31 to the middle of October, Malcolm's stations exhausted their gasoline supplies. On September 2, Malcolm wrote his lessors that his inability to obtain gasoline necessitated his closing of his stations and prompted his intention to file an anti-trust suit. He discussed the possibility of a lawsuit with his attorneys sometime during the month. Malcolm's stations soon began closing. By September 15, at least half of them had closed, although the last station did not close until the middle of October. At the end of September or early in October, Malcolm called additional gasoline suppliers to obtain gasoline. These calls were placed to several suppliers including the four defendants that are gasoline suppliers. Each of the defendants either refused to sell him gasoline or failed to return his calls. Malcolm had similar bad luck in the other calls he made. In addition to these gasoline suppliers that he admitted contacting, there were other uncontacted suppliers known to him. From this evidence,[11] Malcolm contends that he created a

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10. Stone's stated that the reason for the cutoff was the debt to Hi-Octane. Stone's concern for the debt was more than an ordinary concern about Malcolm's credit. Both Stone's and Hi-Octane were acquired by the same company in the summer of 1972. Malcolm knew that these two companies belonged to the same larger organization.

11. On an issue not presently before the Court, Malcolm sought to show that the defendants and other suppliers in refusing to sell gasoline to him acted unlawfully to further the "price-fixing" conspiracy by eliminating his stations. He first offered the general evidence that he claimed tied the suppliers to the conspiracy—the suppliers' dislike of price-cutters and their attempts to injure him by their pricing practices. In addition, Malcolm introduced evidence showing that other price-cutters were refused supply. And testimony was given that indicated that prices increased after Malcolm and other price-cutters left

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jury question over whether the defendants' assumed unlawful refusals to deal led to his failure to get gasoline and the consequent closing of his retail gasoline business.

To collect damages for the assumed unlawful to deal, Malcolm attempted to introduce evidence supporting an assessment of damages for the loss of his business. He testified that he made a bona fide effort to obtain an alternative supply of gasoline and from this fact he infers that he offered evidence of his intent to continue the operation of his stations. Evidence of his intent was supported, he argues, by his testimony that he had opened five new stations in 1972 and that he planned to open four additional stations when he was forced out of business. In addition, he points to several leases, some with unexpired terms of several years. And finally, he testified that he did not intend to sell his stations after building up volume. From this evidence, Malcolm believes that he gave the jury a basis for concluding that his business would have continued for some undetermined period into the future. Malcolm also provided an estimate of his profits per period in order to complete his proof on amounts of damages suffered on the closing of his business. His accountant, Allen, testified concerning Malcolm's profits for the first eight months of 1972. In the course of business in 1972, Allen prepared profit worksheets for Malcolm's operations. Allen testified that Malcolm had a net profit for those eight months, with the last three months' profits offsetting losses in the first five months. These figures, Malcolm contends, provide his best estimate of the operation's future profitability.

Footnote continued—

the market. And on cross-examination by one of the defendant's lawyers, one witness in the gasoline retail and wholesale business testified that Malcolm was the only retailer refused supply before any shortage of gasoline and no one, to the witness' knowledge, had ever been denied supply because of a failure to pay his bills.

II. *Evaluating the Appropriateness of a Directed Verdict for the Defendants*

[2] Malcolm's claim to damages arises under section 4 of the Clayton Act which provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15. As with any private plaintiff proceeding under section 4, Malcolm "must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of the damage." *Chrysler Credit Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133, 1135 (5th Cir. 1979), *cert. granted*, ... U.S. ....., 101 S.Ct. 70, 66 L.Ed.2d 20 (1980).[12] We recognize that there are often no neat dividing lines between the elements of proof required to obtain a damage award for antitrust violations. *See* Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 Nw.U.L.Rev. 691, 694-95 (1963); Note, *Private Treble Damages Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv.L.Rev. 1566, 1573 (1967) [hereinafter cited as Harvard Note]. *See also Terrell v. Household Goods Carriers Bureau*, 494

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12. The requisite proof may be divided into four categories: "the . . . antitrust violation, the fact of injury, the requisite causal relationship between violation and injury, and the amount of damages." *See Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1306 (4th Cir. 1979). Regardless of the segmentation of the plaintiff's case, the same total proof makes the case.

F.2d 16, 21 (5th Cir. 1974). Nevertheless, the posture of this case forces an assumption of antitrust violations and an inquiry into the causal connection of such assumed acts to matters of damage. To avoid the directed verdict on the grounds given by the trial court, Malcolm need show he introduced substantial evidence of injury caused by the alleged violations and the amount of damages.[13]

A. *"Predatory Pricing" to Enforce a "Price Fixing" Conspiracy*

Malcolm's first claim presents a damage theory that is, as he labels it, counter-intuitive. He claims he was injured by a price-fixing conspiracy that included the defendants. Indeed, Malcolm presented evidence tending to show the existence of a price-fixing conspiracy, although we do not pass on whether this evidence was sufficient to create a jury question with respect to the defendants. A conspiracy to fix retail prices is undoubtedly an antitrust violation.[14] But, without more, a retailer in such a market could only with difficulty prove injury to his business by the conspirators' raising of retail prices, because such a retailer would obviously benefit if retail prices increase. *See* Harvard Note, *supra*, at 1573.

[3-5] Malcolm, however, makes additional claims. He alleged and attempted to show at trial that in further violation of the antitrust laws the defendants belonged

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13. Of course, this statement is conditioned on our assumption that Malcolm introduced substantial evidence of the two antitrust violations. If there was no violation, defendants' actions, even if harmful to Malcolm, did not cause him any antitrust injury. *See* Pollock, *supra*, at 694-95.

14. Indeed, it is a "hard core" per se offense of the antitrust laws and is open to criminal prosecution. *See* Baker, *To Indict or Not To Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 Cornell L.Rev. 405, 406-08 & n. 20 (1978).

to a conspiracy that used "predatory pricing" in the retail markets to injure Malcolm and other price-cutters.[15] Given

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15. We infer from Malcolm's brief that predatory pricing is his desired claim. Malcolm's basic claim is that the defendants' price-fixing activities violated § 1 of the Sherman Act. But he claims that his injury resulted from the defendants' contrivance of low retail prices in order to later fix these prices at a high level. He apparently treats this enforcement action as if it is separate from the activity he labels as "price-fixing." But it is not clear exactly what label he would attach to the enforcement mechanism. In his main brief, Malcolm never precisely labels this alleged violation as predatory pricing. Neither does he state which section of the antitrust statutes this action violated. Nor does he cite controlling case law that defines the substantive offense. Although both parties agree that this Court need not pass on the alleged violations, some background discussion of the law allegedly violated would have been helpful in determining the extent, if any, of Malcolm's antitrust injury. Nevertheless, Malcolm does state in his brief that the pricing practices were designed either to gain his cooperation with the price-fixing conspiracy or to drive him out of business. Malcolm, in his reply brief, does begin to label the violations as "predatory price-cutting." Without clearer allegations, these statements indicate that Malcolm believed that the defendants' actions constituted predatory pricing with intent to monopolize, a violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

This interpretation of Malcolm's theory is bolstered by his complaint, where he alleges that in order to fix retail prices, some of the defendants:

> sold below cost for long periods at various of defendants' retail stations located in cities where Plaintiffs did business to cause Plaintiffs to return to retail prices set and approved by members of the conspiracy.

Malcolm apparently viewed this as a violation of § 2, because in discussing the refusal to deal claim against Stone's, not presently a party, Malcolm accused Stone's of "predatory practices" in an attempt to monopolize "in violation of section 2 of the Sherman Act." These alleged "predatory practices" by Stone's involved:

> Sale of gasoline on their retail level at the same time as and at a price lower than their wholesale price.

Although Malcolm's pleading and briefing may leave something to be desired, this Court understands that the violation he alleged and attempted to prove was predatory pricing in an attempt to monopolize.

The defendants were alleged to be members of a conspiracy that took such unlawful action. The conspiracy and pricing action

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this enforcement mechanism, a retail price-fixing conspiracy could easily injure retailers such as Malcolm. Predatory pricing is clearly an antitrust violation.[16] Predatory pricing differs from healthy competitive pricing in its

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Footnote continued—

constitute the violation in this case. Price-fixing may have been the defendants' ultimate goal, but it is extremely misleading to frame the issue before this Court as "whether Malcolm was harmed by a price-fixing conspiracy."

Of course, Malcolm may have intended to allege some other, as yet unnamed, antitrust violation. He may even have viewed the setting of low prices as merely another form of "price-fixing." But the general outline of the offense alleged clearly resembles that of predatory pricing, because Malcolm alleges that the defendants used prices to punish him or injure his business. And for the purposes of discussing causation and damage, the alleged offense is identical to predatory pricing. Thus, we will simply refer to the alleged violations under this count as "predatory pricing," and we will assume that even if Malcolm does not believe that the relevant action constitutes predatory pricing, whatever action he has described would constitute some other antitrust violation.

16. Predatory pricing violates § 2 of the Sherman Act, 15 U.S.C. § 2, when there is an attempt to monopolize, *see United States v. American Tobacco Co.*, 221 U.S. 106, 180-84, 31 S.Ct. 632, 648-50, 55 L.Ed. 663 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1, 43, 31 S.Ct. 502, 509, 55 L.Ed. 619 (1911) § 2 of the Clayton Act, 15 U.S.C. § 13, when the predation includes price discrimination, *see Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), and § 3 of the Robinson-Patman Act, 15 U.S.C. § 13a, under any circumstances. The issues, with regard to predation are the same under all those provisions. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 284 n.1 (1977). A private right of action, however, does not lie for a violation of § 3 of the Robinson-Patman Act, *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 [78 S.Ct. 352, 2 L.Ed.2d 340] (1958), although some lower courts had, at one time, been of the opposite view. *See* 5 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 37.01[4] (1976). In any event, § 2 of the Sherman Act may be used by private plaintiffs who suffer a violation of § 2 of the Sherman Act. *See Ovitron v. General Motors Corp.*, 295 F.Supp. 373, 377-78 (S.D.N.Y.1969); *see generally* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975).

motive: a predator by his pricing practices seeks "to impose losses on other firms, not garner gains for itself."[17]

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17. L. Sullivan, *Handbook of the Law of Antitrust* 111 (1977). *See Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145 (1955). Judicial formulations of the predatory pricing concept often turn on the inherently vague test of intent: if an alleged predator "desires" that its pricing practices injure its competitors, it was using predatory pricing. *See* L. Sullivan, *supra*, at 108-09.

Two writers have suggested that a strictly economic test replace the subjective intent test: predatory pricing occurs when pricing policies yield returns below average or marginal cost, whichever is lower. Areeda & Turner, *supra* note 13. *See also* R. Posner, *Antitrust Law* 184-96 (1976). This suggestion is offered as a way to provide an objective standard as a substitute for proof of intent. One author has defended the focus on the subjective intent of the defendant as proved by less precise means. L. Sullivan, *supra*, at 109-12. This defense is based on the inherent unreliability of economic measurements and judges' and juries' relative ease in understanding human motivations apart from applied economics. *Id.* Such objections challenge the feasibility of a cost-based approach to a trial context.

The Courts of Appeal have recently shown varying degrees of favor toward cost-based tests such as the test proposed by Areeda & Turner. *See Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 430-32 (7th Cir. 1980); *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 742-43 (9th Cir. 1979); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 857 (9th Cir. 1977); *Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir. 1977); *Hansen v. Shell Oil Co.*, 541 F.2d 1352, 1358 (9th Cir. 1976); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 637-38 & n.34 (D.C.Cir.1976); *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 723-25 (5th Cir. 1975).

This consideration of cost-based tests meets with mixed results. Professors Areeda and Turner would generally welcome such a trend. And these developments have been hailed by others. *See, e. g.*, 11 Ga.L.Rev. 960 (1977). But, as noted above, Professor Sullivan has an aversion to cost-based tests, and following the beginning of this trend, scholars have voiced objections to the accuracy and hence desirability of Areeda and Turner's cost-based test. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 285 (1977); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv.L.Rev. 869, 898 (1976). In any event, this classic debate among the titans of the antitrust world rages still. *Compare Williamson, supra and* Williamson, *Williamson on Predatory Pricing II*, 88 Yale L.J. 1183

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Assuming that such action occurred in this case[18] Malcolm has more to prove in order to show his right to recover antitrust damages.

Footnote continued—

(1979) and Scherer, *supra with* Areeda & Turner, *Williamson on Predatory Pricing*, 87 Yale L.J. 1337 (1978) *and* Areeda & Turner, *Predatory Pricing: A Rejoinder*, 88 Yale L.J. 1641 (1979) *and* Areeda & Turner, *Scherer on Predatory Pricing*, 89 Harv.L.Rev. 891 (1976).

This Court need not presently offer its views on this debate. But before he may get his case to a jury, Malcolm must establish the existence of the substantive violation of predatory pricing in the time period and markets for which he intends to claim damages. On this appeal, he is greatly aided by our assumption that he proved the substantive violation alleged.

18. The trial court specifically stated that its directed verdict was based only on lack of evidence on causation and amount of damages. Given this limitation, the simplest method of handling this appeal would be to assume the existence of whatever violations Malcolm alleged and to limit our holding to causation and damages. Proceeding under that method we assume that Malcolm proved predatory pricing traceable to some extent to the defendants' actions that intermittently took place over a 15 month period in the several markets serviced by the nine of Malcolm's stations for which he claimed damages.

The trial court, however, did not entirely agree with this perception of the case. It sometimes viewed parts of the substantive violation as if they were parts of the causation question. We can and do simply hold the trial court to the explicit limits of its directed verdict order. But, in the alternative, such parts of the trial court's order may be answered directly as well.

For example, the trial court, in explaining its direction of the verdict, asked: "How can the jury conclude that just because anybody went down in price at the time Mr. Malcolm went down that that was caused by the conspiracy? That's sheer guesswork." This question seems directed at the alleged violation rather than causation, although it is framed in causation terms. A drop in prices is perfectly legal, but a drop in prices instigated by a conspiracy to rid the market of price-cutters would be unlawful. *See* note 17 and accompanying text *supra*. In any event, Malcolm did offer evidence tying the conspiracy to the price drops when he offered evidence of: 1) alleged conspirators' threats of price drops unless he increased his prices; 2) simultaneous price drops at every location where he had a station; and 3) the defendants' antipathy toward price-cutters as evidenced by their temporary price allowances that placed price-cutters such as

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1. *Causation of Antitrust Injury*

Assuming the existence of predatory pricing violations, Malcolm should encounter relatively less difficulty in proving an antitrust injury resulting from unlawful conduct of this sort.

Footnote continued—

Malcolm at a competitive disadvantage. This evidence should suffice to create a jury question regarding the conspiracy's connection to the price drops, assuming the existence of a conspiracy. Intent behind predatory pricing, or, as in this case the connection between the conspiracy and the unnaturally low prices, is not susceptible of direct proof, L. Sullivan, *supra* note 14, at 111, because conspirators are unlikely to leave such proof. It seems to place too great a burden on plaintiffs to show separate intent behind each discrete instance of low prices once evidence of a conspiracy has been introduced.

Similarly, the trial court, while commenting on Malcolm's testimony asked: "[I]f the defendants did not go down [in price] in concert, then where is the cause and effect of the conspiracy." These comments resulted from the trial court's perceived conflict in Malcolm's testimony, where on direct examination, Malcolm stated that in 1971 and 1972 his competitors "dropped the price" and then on cross-examination, he stated that "every competitor didn't drop his price when I dropped mine." At most this inconsistency, challenges the credibility of Malcolm and is not a proper ground for a directed verdict. And in any event, not every competitor need be a conspirator before Malcolm's business is injured.

In addition, the trial court was troubled because Malcolm had not specifically stated which competitors dropped their prices. The trial court asked:

> How is the jury going to conclude who went down? And why they went down? Just on the word "everybody." You can't prove a conspiracy by saying everybody did it, gentlemen.

This statement carries two meanings. First, it challenged the effect of the violation. Malcolm specified the competitors of each of his stations. If he stated on direct examination that all of them went down in price, his meaning is sufficiently clear. His credibility may be improved by a second specific recitation of the competitors' identities when the specific price drops were discussed. But if Malcolm intends to accuse them all of such action, it is not clear why he could not make such a statement in the simplest possible terms. Second, this statement challenges the existence of a conspiracy, but the trial court explicitly reserved judgment on whether a conspiracy has been proved.

If predatory pricing occurs it will most likely harm honest competitors within the markets where the predatory prices are posted. The very purpose of predatory pricing is to cause injury to a competitor's business. In cases where the defendants' acts are motivated by intent to injure the plaintiff, the inferential leap to the finding of fact of damage, is not great. Indeed, one court has found it to be virtually non-existent:

> Such damage need not be made patent item by item as on a balance sheet. The mere unlawful combination over a period of time to eliminate competition is proof of damage.

Fox West Coast Theatres Corp. v. Paradise Theatre Building Corp., 264 F.2d 602, 608 (9th Cir. 1958). In this case, given the assumption of predatory pricing conduct, Malcolm's business would be directly injured by depressed market prices. Regardless of a businessman's reaction to predatory pricing some injury will almost certainly follow: if he retains his price he will lose volume and if he lowers his price he will have a smaller margin of profit on each unit sold.[19] His total revenues, and hence

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19. This is not a novel observation.

In a case involving similar price-cutting by competitors, the Supreme Court summarily concluded that the record contained sufficient evidence of injury to the plaintiff's business and property resulting from the unlawful combination, and, in discussing the amount of damage the Court noted that:

> [I]t is fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices . . . .

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931).

In discussing the proof of causation in a private antitrust case, one author has stated that:

> There are three stages of proof in treble damage cases: first, that defendant committed a violation; second, that it

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profits, will usually decrease in a depressed market.[20] Malcolm, in this case, provided the district court and jury with evidence of injury caused by the violation when he testified that a particular price generally prevailed, on his entry to the market he set a slightly lower price, and after his entry into the market his competitors dropped

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Footnote continued—

> caused plaintiff some harm; third, the amount of the harm. In some cases, evidence establishing the violation will support the inference that plaintiff must have suffered some harm as a result—it will, in short, establish the first two elements of the case together. Thus, in *Story Parchment Co. v. Paterson Parchment Paper Co.*, proof that defendant cut prices below the cost of production in order to drive plaintiff out of business would without more justify the conclusion that defendant must have caused plaintiff, one of his competitors, some loss, unless other evidence rebutted it.

Harvard Note, *supra*, at 1573 (footnote omitted). The situation envisioned by that author greatly resembles Malcolm's case.

In another context, one court has discussed the effect of an ultimate buyer-defendant's actions in depressing the market price for the goods upon the original sellers:

> [T]here was sufficient evidence that the plaintiffs sold cattle in a market at prices depressed due to the acts of the defendant. It was the defendant who created an environment into which the plaintiffs were forced to sell their wares. . . . That this economic manipulation had a direct adverse effect on the plaintiffs—cattlemen attempting to sell in a depressed market—is obvious.

Bray v. Safeway Stores, Inc., 392 F.Supp. 851, 863-64 (N.D.Cal. 1975) (citation omitted), *cause dismissed following settlement by parties*, 403 F.Supp. 412. *See also Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976).

20. An antitrust plaintiff must show an anticompetitive injury of the kind envisioned by the antitrust laws. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Thus, an injury resulting from normal price competition would not entitle the plaintiff to recover. But any injury resulting from predatory pricing would be an anticompetitive injury because the substantive violation is anticompetitive, by nature—it is distinguished by definition from normal competitive pricing—and lost sales or profits are the kind of injury to be remedied by a private right of action.

to a predatorily low price.[21] This evidence easily translates into a finding of lost revenue and, hence, profits for Malcolm's business. By this evidence, Malcolm offered proof that the price was often below what he, in his

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21. The existence of low prices may be part of the proof of the substantive violation. Assuming that the legal requisites for proof of the predatory pricing violation were satisfied, the evidence of low prices would also be part of the proof of damage. Because of the nature of predatory pricing, this evidence would be used to prove both the violation and the fact of damages. Thus, to show the fact of damage Malcolm must have introduced evidence of low prices which we will assume constituted the violation.

Malcolm met this requirement with three forms of evidence. First, he testified about instances where in relevant markets his competitors set unnaturally low prices that dropped to near his wholesale costs. Second, Malcolm points to testimony by others of low or depressed prices in various retail markets. Third, Malcolm also introduced evidence of his own average monthly retail prices. And, if his method of calculating damages is followed, from these averages, a Court can derive the approximate average monthly price prevailing in the independent retail markets. This conclusion follows because Malcolm claims that he priced one to two cents per gallon below the prevailing independent price. And if the average prevailing price, thus derived, is below the "normal price" Malcolm would claim that this piece of evidence shows the existence of depressed prices in a third way.

We are aware that Malcolm's stations generally operated in different markets, even though Malcolm in his brief has made no attempt to detail the relevant markets and time period or to show specifically how his stations in these relevant markets were injured. His proof relevant to the injuries claimed are merely lumped together with proof relating to markets and time periods for which damages are not claimed. Malcolm left it for the court to sort this evidence. Evidence of depressed prices in Macon would not affect the profits of Malcolm's station in Valdosta. But those depressed prices would injure the profits of Malcolm's Macon station. Thus, there was evidence of injury because there was evidence of low prices in several relevant markets. And if the low prices, shows to exist in at least some of the relevant markets, constituted predatory pricing violations, Malcolm has shown the possibility of at least, *some* antitrust injury. Any further inquiry then must be directed at the proof of the *amount* of damage in those markets. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 1571 n.9, 23 L.Ed.2d 129 (1969). And Malcolm's evidence of depressed prices as derived from his own prices would be evidence of depressed prices in all relevant markets. Thus, Malcolm would have shown some injury at all nine stations for which damages are claimed.

business judgment, obviously believed was his profit-maximizing price in a competitive market; hence, he offered proof that he was in fact injured[22] by these low

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22. Cases involving maximum price ceilings set by defendants in other cases are urged upon us by the present defendants who apparently argue that those cases offer a useful analogy on the present causation issue. We agree that these cases are somewhat analogous, but we believe they do not undercut the plaintiff. Malcolm has satisfied the injury-in-fact requirements of those cases. *See Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564 (5th Cir. 1978) (plaintiff must show that he could have sold same volume at higher prices in a free market and in absence of defendant's restraints on maximum price). These cases did not involve major disruptions of market prices. Where these plaintiffs were restrained from raising prices, they must still demonstrate why they could have raised prices absent the restraint. Without evidence that the prevailing market prices was higher than the restrained price this showing of injury would be difficult. In this case, it is clear that if the market price had not been lowered below normal, every retailer could have raised his prices without losing volume. Thus, Malcolm does not have as difficult a proposition to prove as did those plaintiffs in the price restraint cases. He has sufficiently shown that his profit-maximizing price was greater than the low market price effectively set by the conspirators in those specific instances of unnaturally low prices testified to by Malcolm. And with respect to the other periods of time when the prices were below normal, we think it is sufficiently clear that if the market prices rose, Malcolm could and would have raised his prices.

The Ninth Circuit has on one occasion found that a requirement such as the one in *Kestenbaum* is unnecessary. In that case, Judge Hufstedler wrote that:

> Rather than imposing the nearly impossible burden of proving what each dealer would have done if he had been free to make his own pricing decision, we assume that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is, dealers are profit maximizers. This assumption merely amounts to a recognition that a "restraint" in fact restrains. The defendants can attempt to show plaintiffs would have kept their prices beneath a maximizing point despite their violative behavior. Contrary evidence might include dealer testimony that he would not have raised his price, or a showing by the defendants that the dealers had reasons other than the restraint for selling below a profit-maximizing price.

Knutson v. Daily Review, Inc., 548 F.2d 795, 812 (9th Cir. 1976). We need not follow the Ninth Circuit rule in order to hold that

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Footnote continued—
Malcolm did produce sufficient evidence of his injury in fact, because Malcolm did offer evidence that retail prices were lowered below the price level he had chosen.

The defendants, at this point, make an interesting argument. They assert that Malcolm's marketing philosophy conflicts with his damage theory on this count. Malcolm testified that he often lowered his prices to increase his volume and the defendants argue that this testimony contradicts his damage theory which holds that Malcolm was injured when the defendants' conspiracy forced him to lower his prices to meet depressed prices caused by the defendants' acts. The defendants argue that Malcolm should have sold a larger quantity when he lowered his prices to meet the predatory prices in the market than when he sold gasoline in a free market. In support of this argument, the defendants cite the work of an economist who was once retained by Malcolm:

> [E]xperience shows that, if other things remain equal, buyers will buy a larger number of units of a good at a lower price than they will at a higher price.

R. Pfouts, *Elementary Economics: A Mathematical Approach* 22 (1972). Many economists have undoubtedly expressed similar opinions because this tenet is basic to the price theory of economists. But this view of the "laws" of supply and demand does not undercut the plaintiff's case. The key assumption in the quotation is found in the phrase "if other things remain equal." In this case, Malcolm could expect to sell at least the same volume at a higher price if all his competitors abandoned predatory pricing and raised their prices back to the "normal price." If they took that action Malcolm could actually expect to increase his volume because he would regain his only competitive advantage—the ability to price below other independent retailers in a freely competitive market. Upon regaining that advantage Malcolm could return to his policy of pricing one to two cents below other independents and his relative market share, and hence volume, would naturally *increase*. Under the defendants' asserted view of economics Malcolm would be privileged to sell his goods in a market of depressed prices created by the defendants.

Defendants also urge upon us *Chrysler Credit Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), *cert. granted*, ... U.S. ....., 101 S.Ct. 70, 66 L.Ed.2d 20 (1980) and *Foremost-McKesson, Inc. v. Instrumentation Laboratory, Inc.*, 527 F.2d 417 (5th Cir. 1976) as examples of the proper application of directed verdicts with respect to antitrust issues of causation and damage. We find that those cases are distinguishable from this case. Neither *Chrysler Credit* nor *Foremost-McKesson* concerned alleged actions that were as inherently destructive or as calculated to injure as the actions alleged in this case. The rebates, discounts and

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prices.[23] The district court's ruling on this point accordingly must be reversed.

2. *Amount of Damage*

[6-8] Once beyond the question of fact of damage, the antitrust plaintiff's task is eased. The antitrust plaintiff's burden of proving the amount of damages is lighter than the burden of proving injury in fact. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 23-24 (5th Cir. 1974). Often the nature of the violation makes calculation of damages difficult. "In such [a] case, while the damages may not be determined by mere speculation, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931). The amount of damages may be shown by just and reasonable inference with juries voting upon the probable and inferential as

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Footnote continued—

other actions challeged in those cases can very easily serve competitive purposes. A part of the substantive violation of predatory pricing is the intent to injure competitors. Given the intent behind predatory pricing and the natural tendency of such action to injure, it is correct that we not demand, in this case, the stronger evidence of causation required by those two cases. Moreover, *Foremost-McKesson* may also be distinguished because of the numerous evidentiary deficiencies in that plaintiff's case. In an action against a competitor, that plaintiff failed because: it also engaged in "all or nothing bidding," one of the challenged practices; was not at all shut off from obtaining "exclusives" such as those it challenged were held by the defendant; and failed to specify other alleged losses.

23. We repeat that this is a cognizable antitrust injury only if it was the result of predatory practices, not if it was the result of normal competitive policies.

well as upon direct and positive proof. *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 23-24 (5th Cir. 1974); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946). In fact, given proof of the fact of damage, proof of losses which border on the speculative is allowed in order to facilitate the policy of the antitrust laws. *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 887 (1st Cir. 1966); *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 903 (5th Cir. 1973). And estimates may be based on assumptions so long as the assumptions rest on adequate bases. *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 24 (5th Cir. 1974); *Hobart Brothers Co. v Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 902 (5th Cir. 1973). The estimate of the amount of damages may even suffer from minor imperfections. *Id.* at 903. Each sale and the amount of loss on the transaction need not be shown; averages may be used to show that the plaintiff generally lost money over a period of time. *See Bray v. Safeway Stores, Inc.*, 392 F.Supp. 851, 863-65 (N.D. Cal.1975). And a non-expert's testimony regarding the past sales volume and profit margin may be used to measure damages. *See Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 580-81 (5th Cir. 1980) (*Coors II*). The defendant is not relieved of liability just because the plaintiff does not show the exact volume and price figures possible within the damage period. *Id.* at 581. As the *Coors II* Court stated: "To hold otherwise 'would enable [the defendant] to profit by [its] wrongdoing at the expense of [its] victim.'" *Id.* at 581 (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946)).

Guided by these principles indicating a lenient standard of proof, this Court must reverse the district court's

directed verdict which was made in the belief that the plaintiff's evidence on the amount of damage was insufficient. Malcolm's proof of the amount of damage was not precise. But assuming that a plaintiff has offered sufficient evidence of the fact of damage, a directed verdict against that plaintiff on the amount of damages is proper only in the most unusual circumstances. Malcolm's proffered evidence offered a comparison of actual revenues with the revenues possible absent the defendants' actions.[24]

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24. Malcolm prepared summaries of his expenses and revenues for the relevant time period. The revenue records contain Malcolm's average monthly retail prices as derived from Malcolm's business records that were also in evidence. The defendants attack the validity of the revenue and expense figures, but these arguments are directed to the accuracy of these figures. The key variable is the retail price figure, and we will focus on it. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 283 U.S. 555, 561-62, 51 S.Ct. 248, 49-50, 75 L.Ed. 544 (1931). In computing the amount of his damage, Malcolm attempted to demonstrate that amount by estimating how much he would have increased his retail price but for the actions of the conspiracy. He offered evidence that he set his prices one to two cents below the independent retail competition. There was evidence from the defendants' records and testimony of a "normal price" that prevailed in absence of price depressions that Malcolm asserts were created by the defendants. Thus, Malcolm claims that he would have set his price at one to two cents below the "normal price" but for the defendants' allegedly unlawful acts. The difference between this projected price and Malcolm's actual average monthly price represents Malcolm's lost revenue per gallon of gasoline sold. He assumes his relative share of the retail market, and hence his volume, would remain constant in these calculations because all retail prices would rise by at least as much as his prices. From these figures his lost profits may be derived in substance.

A chart comparing these figures for one city would be illustrative. Set out below is a chart of the figures for Macon. Macon is apparently the city for which the most complete records are available. Included for further illustration in this chart are price figures of Malcolm's Macon competitors whose data is available in some of the exhibits. These same exhibits show the normal price in Macon.

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Footnote continued—

Macon 1971

Macon Prices per gallon	Jan.	July	Aug.	Sept.	Oct.	Nov.	Dec.
Regular Gas Malcolm Avg.	29.9	29.9	30.0	29.9	29.3	27.2	N/A
Market Range	30.0	33.9 to 34.9	26.9 to 34.9	24.9 to 32.9	29.9 to 33.9	25.9 to 33.9	25.9 to 33.9
Normal	34.9	34.9	34.9	34.9	34.9	34.9	34.9
Premium Gas Malcolm Avg.	30.0	30.9	31.9	33.9	30.2	29.9	N/A
Market Range	32.9 to 33.9	35.9 to 38.9	29.9 to 36.9	28.9 to 37.9	32.9 to 37.9	27.9 to 37.9	28.9 to 36.9
Normal	38.9	38.9	38.9	38.9	38.9	38.9	38.9

Macon 1972

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.
Regular Malcolm Avg.	29.1	28.6	27.8	28.1	28.4	28.6	27.9	28.6
Market Range	25.9 to 33.9	28.9 to 29.9	26.9 to 28.9	26.9 to 32.9	25.9 to 32.9	26.9 to 34.9	27.9 to 32.9	28.9 to 34.9
Normal	34.9	34.9	34.9	34.9	34.9	34.9	34.9	34.9
Premium Malcolm Avg.	32.3	31.7	30.0	31.4	32.0	33.1	31.2	33.6
Market Range	28.9 to 37.9	31.9 to 32.9	30.9 to 31.9	28.9 to 36.9	28.9 to 36.9	30.9 to 38.9	31.9 to 36.9	32.9 to 38.9
Normal	38.9	38.9	38.9	38.9	38.9	38.9	38.9	38.9

There is a fact question regarding the true level of normal prices. The normal prices shown in the chart were taken from defendant Tenneco's records. Other evidence offered by Malcolm, and taken from defendant Marathon's records, showed that the defendants perceived the normal Macon price for regular gasoline to be 32.9, Pl.Ex. 291, Pl.Ex. 365, and the normal Macon price for premium gasoline to be 36.9 Pl.Ex. 291. Malcolm also testified that in some instances, the normal price was 30.9 or 29.9 for regular. Resolution of this difference would be for the jury.

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This comparison is the essence of proof of damage. Malcolm presented evidence of his *monthly average* prices rather than evidence of his actual *daily* prices. But the use of averages is acceptable. Built into the average monthly price figure is every instance when Malcolm decreased his price beneath the "one to two cents below normal price" that was his desired level. These instances are the times when Malcolm was forced to lower his prices.[25] The specific instances, about which Malcolm

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Footnote continued—

None of the other exhibits cited by the plaintiff indicate what level of retail pricing is considered normal for *independent* retailers. Those exhibits prove other points. Neveretheless, no evidence indicates that a different "normal price" would be expected in the several other Georgia cities where Malcolm had gasoline stations. Indeed, in reading the exhibits discussing the "normal prices," one gets the belief that normal prices were fairly uniform throughout the region. Therefore, we will take the nomal price proved for Macon to be the normal price for the other Georgia cities where Malcolm had stations.

The reliance on the "normal price" as a benchmark for showing the price Malcolm could have charged absent the conspiracy arises from the trial court's rejection of Malcolm's exhibit showing hypothetical revenue projections based upon hypothetical retail gasoline prices. The trial court indicated some willingness to admit this exhibit if Malcolm in his capacity as a busnessman testified regarding the likelihood of his ability to achieve the otherwise hypothetical prices. Malcolm's counsel did not take this hint to offer the necessary foundation for this exhibit containing hypothetical figures. Under these circumstances, we disagree with Malcolm and feel that the trial court correctly refused to admit the hypothetical figures, although we do not indicate whether such testimony by Malcolm as suggested by the trial court would have cured the defect.

In any event, Malcolm may, we believe, rely upon the "normal price" as his benchmark to prove the amount of damage.

25. Malcolm did not testify that, in response to the market price drops, he lowered his price. But he would clearly be injured by such general price decreases and we can infer that he did lower his price, because he did offer evidence that he sought to compete on the basis of low prices and to stay one to two cents beneath the market. Thus, it is natural to expect that if the general market price decreased, Malcolm would follow that price in order to fulfill his marketing philosophy and to preserve his only competitive advantage. It would be unrealistic to expect that a small businessman would remember his daily reaction to market prices.

testified, constituted only examples of the pricing actions that Malcolm has alleged to be unlawful. The full range of the allegedly unlawful activity then is mirrored in Malcolm's average monthly prices. As Malcolm's prices track the market prices,[26] a comparison of these figures with the potential revenues if "normal" prices prevailed would constitute the heart of a plaintiff's proof of the amount of damages in a case such as this one. The directed verdict on this ground was improper.

B. *Refusal to Deal by the Price-Fixing Conspiracy*

Malcolm sought to prove that when the conspiracy's predatory actions failed to drive him out of business, the conspirators turned to sterner measures. The conspiracy allegedly refused to sell Malcolm any gasoline needed for his stations.[27] This action, Malcolm claims, put him out of business, because it dried up his supply of his only product, gasoline.

[9, 10] The alleged antitrust violation lay in the concerted refusal of the defendant-suppliers and others to sell any gasoline to Malcolm. A unilateral refusal to deal is not unlawful. *See United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). Poor credit may constitute a defendant's proof that the refusal to deal was a unilateral rather than conspiratorial decision. *See Scott Medical Supply Co. v. Bedsole Surgical Supplies, Inc.*, 488 F.2d 934, 938 (5th Cir. 1974); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 301 & n.22 (5th Cir. 1978). Furthermore, concerted activity in refusing to deal is not

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26. Of course, the defendants may attempt as a defense to show that Malcolm caused the market prices to decrease rather than the market forcing Malcolm to decrease his price. But we need not resolve this problem on this appeal.

27. Malcolm also testified that one of the conspirators, his last supplier, sought to buy him out just before the refusal to deal.

unlawful but concerted activity that is based on an illegitimate motive is forbidden.

> [A concerted] refusal to deal becomes unlawful when it produces an unreasonable restraint on trade, *i. e.*, if there is an anticompetitive purpose or effect in selecting those with whom one will deal. A refusal to deal may not be used as a device to achieve some anticompetitive goal such as to acquire a monopoly, or to fix prices, or to estabilsh market dominance and drive out existing competitors, or to aid the enforcement of unlawful resale price restrictions and territorial allocations, or to increase the seller's own market dominance, or to enforce a boycott, or to promote the predatory practices of the seller. This requirement of illegitimate purpose or effect marks the distinction between concerted activity which is an innocent aspect of business and concerted activity which is inimical to competition.

Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1115 (5th Cir. 1979) (footnotes omitted). For example, suppliers and retailers may not combine together to refuse to deal with a troublesome retailer in order to drive out that maverick. *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178, 186-87 (5th Cir. 1972); *see Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

This Court need not decide whether Malcolm has proven that the defendants' refusal to deal constitutes an antitrust violation. Because the trial court did not direct a verdict on this ground both sides have assumed, without conceding, that the defendants' refusal was an antitrust violation. This Court will assume that the defendants' refusal was unlawful and review the district court's action only on the causation and damage grounds.

1. *Causation of Antitrust Injury*

Malcolm, as a private plaintiff, must prove that the defendants' actions *caused* his injuries. In this case in order to claim lost future profits as damages, he must prove that the defendants' refusal to deal caused him to close his gasoline stations.

The general standards for a plaintiff's proof of causation are clear. Malcolm need not show that the refusal to deal was the sole cause of the loss of his business. *See Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1321 (5th Cir. 1976); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974); *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 885 (1st Cir. 1966). He need only show that the defendants' illegal conduct was a material cause of some damages. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 1571 n.9, 23 L.Ed.2d 129 (1969).

> [A] plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4 [of the Clayton Act, 15 U.S.C. § 15].

Id. If some suppliers refused to sell Malcolm gasoline for valid reasons and the defendants' unlawful refusal eliminated other potential sources of gasoline, the defendants could nevertheless be liable to Malcolm.

Those basic principles are simple to apply in this case. Malcolm attempted to show that his last supplier, Stone's, was a part of the conspiracy and its refusal to deal was unlawful. The defendants claim that Stone's refused to sell to Malcolm because of his poor credit and there was no evidence that Malcolm would have been cut off if he had paid his debt. If the defendants are correct, Stone's

refusal was lawful. Malcolm, however, offered evidence that Stone's was a conspirator in the unlawful concerted refusal to deal. In any event, we need not determine this fact question because we assume that the violation alleged by Malcolm did occur. But even if the refusal of Stone's was lawful, this fact would not, under the principles outlined above, excuse subsequent unlawful refusals by the defendants. Nor would it decrease the compensable injury suffered by Malcolm, because the subsequent refusals by the defendants would still be necessary to put Malcolm out of business. If the defendants had sold Malcolm gasoline at that time he could have remained in business. And, thus, those refusals would be a "material cause" of that injury. The arguments of the defendants paraphrase the district court's order and share the order's mistaken premise that the antitrust violation must be the sole cause of the defendant's injury.

The defendants next claim that their refusals could not have caused the demise of Malcolm's business because their refusals followed Malcolm's decision to terminate his business as indicated in a letter written in early September. This is a fact question and does not entitle the defendants to a directed verdict. Malcolm testified that he wrote the letter under the impression that Stone's refusal to deal had put him out of business. He also testified that later he genuinely sought gasoline to keep his business alive. This letter obviously does not strengthen Malcolm's case but it does not permit a directed verdict against him. An inference may be drawn from the evidence that after writing the letter, Malcolm changed his mind and legitimately sought gasoline to keep his still viable business alive.

[11] The defendants further argue that their refusal in any event did not cause the exhaustion of Malcolm's

gasoline supply, because Malcolm failed to contact all known alternative suppliers of gasoline. They contend that this evidence shows that Malcolm voluntarily abandoned his business and the alleged illegal refusals did not *cause* his business' demise.[28]

Language in some opinions seemingly supports the defendants' contentions. The Court of Appeals for the Sixth Circuit has stated that:

> An essential element in attempting to establish the fact of damage because of exclusion from a specified source of supply is the lack of an alternative comparable substitute for the desired merchandise. . . .

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28. Malcolm responds that even if the refusal to deal did not directly force him out of business, he may still claim damages for the loss of his business because the pricing practices oppressed his business. A plaintiff need not "retain possession of a business oppressed by antitrust violation until the business is bankrupted or directly shut down by the violator." *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1244 (5th Cir. 1974). Malcolm is correct that he may voluntarily close his business and still collect lost future profits if he can show that the defendants' antitrust violations forced him out of business. This Court has stated that:

> We do not accept [the defendant's] restrictive application of the principle of future profits as antitrust damages. When a practice condemned by the Sherman Act puts a small operator out of business, we do not think it matters whether the antitrust violator directly closes down the small proprietor or whether he takes anti-competitive steps which foreseeably will result in the proprietor's demise if carried on for a sufficient amount of time.

Lehrman v. Gulf Oil Corp., 464 F.2d 26, 45 (5th Cir. 1972). Although Malcolm correctly states the law, these principles do not aid him because his proof does not show that the defendants' oppressive pricing practices forced him out of business. This isolated mention of the defendants' "oppressive" pricing practices does little to bolster his argument for damages based on future profits. All his other arguments and proof at trial were directed at showing that he was entitled to such damages because a concerted refusal to deal put him out of business. He may not under these circumstances argue that the oppressive pricing practices caused his business' demise. His proof as discussed in his brief fails to show a causal link between the pricing practices and his closing his service station.

> In *Ace Beer Distributors, Inc.* [*v. Kohn*, 318 F.2d 283 (6th Cir. 1953)] this Court said at page 287: "There is no allegation or contention that the beer of other breweries was not just as available in that area after the change of distributors as it was before."

Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., 459 F.2d 138, 148-49 (6th Cir. 1972). In commenting on *Elder-Beerman*, the Court of Appeals for the Fourth Circuit has stated that the case "stands for the uncontroversial principle that a § 4 plaintiff, like any other, must prove actual injury in order to recover." *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1305 (4th Cir. 1979). This view would be premised upon the notion that a refusal to deal by some suppliers could not close a business that can avoid the effects of the concerted refusal by turning to another supplier. If such a business closes, under this reasoning, it would be because of the plaintiff's failure to tap alternative sources and not because of the concerted refusal to deal.[29]

[12] We agree that in a refusal-to-deal case, a plaintiff who bypasses an obviously adequate alternative supplier should not recover for the loss of his business. But we do not agree that a plaintiff, seeking to recover damages because of an unlawful refusal to deal, must show a lack of an alternative supply.

Malcolm claims that the conspiracy foreclosed him from purchasing gasoline supplies. If a retailer is unlawfully denied his sole product by his supplier and others he would quickly be out of business unless he took further

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29. Of course, a plaintiff who does tap an alternative source may still prove some injury if a change of suppliers results in other losses such as increased costs or decreased revenues. *See Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1305 (4th Cir. 1979). This recognition will not greatly aid Malcolm who seeks to recoup future profits.

action. The end of his business in any event would be causally linked to the refusal. Thus, the refusal has in fact injured the retailer.

[13] But an antitrust victim must seek to minimize the amount of his damages. A victim of an unlawful refusal to deal must attempt to locate suitable substitutes for the denied goods. In such a case, this Court has articulated that concept: "An antitrust plaintiff has a duty to mitigate damages." *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 436 (5th Cir. 1977).[30] He must take "reasonable steps to merchandise substitute [goods]." *Borger v. Yamaha International Corp.*, 625 F.2d 390, 399 (2d Cir. 1980). If the victim takes such steps but fails to find an alternative source, the amount of damages would not be decreased by the mitigation efforts. If he finds an alternative source, he may still be injured if he would have been better off without the refusal, but the amount of damage would be reduced. *See* note 29 *supra*.

[14] In any event, Malcolm prevails on this issue. Even if Malcolm was under a "duty" to minimize his damages the defendants were not entitled to a directed verdict, because the "burden of showing that the victim of tortious conduct failed to minimize his damages rests with the wrongdoer." *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 933 (5th Cir. 1979) (citing *Golf*

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30. This formulation is slightly inaccurate, because an Hofeldian plaintiff has no "duty" where there is no correlative right. *Ellerman Lines, Ltd. v. The President Harding*, 288 F.2d 288, 289 (2d Cir. 1961) (citing *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30-32 (1913)). The rule may be conceived as a method of apportioning damages between the parties. And its proper formulation is that a defendant is not liable for post-injury consequences avoidable by the plaintiff who uses reasonable care. *See Tennessee Valley Sand & Gravel Co., v. M/V Delta*, 598 F.2d 930, 932-33 (5th Cir. 1979); *Ellerman Lines, Ltd. v. The President Harding*, 288 F.2d 288, 289-90 (2d Cir. 1961).

City, Inc. v. Wilson Sporting Goods Co., 555 F.2d 426, 436 (5th Cir. 1977)). The defendants must show that the injured party's conduct was unreasonable and aggravated the harm. *Id.* at 933. The defendants did no more than establish that Malcolm failed to contact a few known suppliers of gasoline. They did not establish that those dealers could or would have sold Malcolm the needed product in sufficient quantities to keep his business alive. The defendants, thus, did not prove a failure to mitigate damages.

[15] Even if the burden was on Malcolm, he would still prevail on this point. Requiring an antitrust plaintiff to prove such a negative as a lack of alternative supply places too great an obstacle in the way of antitrust recovery. The greatest burden that reasonably could be placed on him would be the burden to show the reasonableness of his mitigation efforts. And even if Malcolm had that burden, we would hold that he has met this burden by introducing evidence of his efforts to obtain alternative suppliers of gasoline. This proof consisted of Malcolm's testimony that his numerous calls to gasoline suppliers failed to secure him any gasoline. The district court's ruling on this point accordingly, must be reversed.

2. *Amount of Damages*

The district court also directed a verdict against Malcolm for a failure to offer substantial evidence of the amount of damage. We must disagree with the district court's judgment.

Many of our statements regarding the amount of damage from the prior count are again applicable. Once the "fact of damage" is proved a lower standard of proof controls the proof of "amount of damages." *See Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20-21

(5th Cir. 1974). Various formulations of the standard by the Supreme Court support the notion of a lessened standard.

> [T]he jury may make a just and reasonable estimate of the damage based on relevant data . . . . In such circumstances "juries are allowed to act on probable and inferential, as well as upon direct and positive proof."

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564, 51 S.Ct. 248, 251, 75 L.Ed. 544 (1931)). This relaxed standard is based on a recognition of the difficulty in reconstructing events that might have happened but for the defendant's unlawful conduct. It is appropriate that if there is uncertainty, the defendant should bear the burden of that uncertainty because his unlawful actions created it.

Malcolm sought to recover his lost future profits. The relaxation of standards of proof are particularly appropriate in cases where the finder of fact must estimate lost future profits. When "damages must be assessed so as to approximate the future profits of a business, a court and a jury necessarily enter into the realm of the imprecise and the uncertain." *Lehrman v. Gulf Oil Co.*, 464 F.2d 26, 45 (5th Cir. 1972).

On this issue Malcolm's evidence of past profits sufficed to create a jury issue regarding the amount of damages suffered in the form of lost future profits. Evidence of past earnings is generally acceptable proof on this issue. *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 887 (1st Cir. 1966). His evidence consisted of the business' profit record for the last eight months. Surely a longer history would ordinarily be desirable but on the

facts of this case, it may not have been either desirable or appropriate. Malcolm's profit records were prepared in the ordinary course of business by his accountant who testified regarding their accuracy. The records were not reflective of a remote isolated period in the middle of Malcolm's business history—they reflected Malcolm's performance over the eight months period just preceding the demise of his business. In addition, records of the business' earlier performance were not nearly as relevant given the expansion of Malcolm's business from 12 stations at the beginning of 1972 to 17 stations in August of 1972 when he lost his gasoline supplier.[31] Because of these circumstances, we believe that Malcolm's proof of his profit over his last eight months of business sufficed to create a jury question on his lost profits.[32]

Even assuming the past profits are a sufficient basis for projection of lost future profits, the defendants argue that the plaintiff's case is fatally flawed because he gave no evidence of how long he would have stayed in business. But these other arguments are also without merit. This Court has previously found evidence of future duration of a business to be inferable from evidence of a plaintiff's age, health and desire to remain in business. *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659, 670-71 (5th Cir. 1974). Malcolm offered comparable evidence. He testified that his plans for future expansion were cut short by the de-

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31. Moreover, Malcolm had plans for further expansion that are in no manner accounted for in his evidence of profit history. Malcolm also argues that these figures are conservative for an additional reason—the defendants' "predatory" pricing practices reduced Malcolm's profits in 1972.

32. We recognize that courts have disapproved of estimates based on short, unrepresentative periods. *See, e. g., Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1360-61 (9th Cir. 1976). But on the facts of this case a longer period would not necessarily represent a true picture and we have no reason to believe the period was unrepresentative.

fendants' refusal to deal. In addition, he testified that he was making a bona fide effort to locate gasoline.[33] Moreover, Malcolm introduced evidence of several long-term leases that indicated his intentions to remain in business.[34] Thus, the jury could infer that Malcolm would have stayed in business but for the refusal to deal.

Under these facts, we believe that Malcolm introduced sufficient evidence to create a jury question on the issue of amount of damages resulting from the defendants' unlawful refusal to deal, and the district court's ruling must be reversed.

Conclusion

We hold that with regard to both counts, Malcolm introduced substantial evidence of causation and amount of damage. This holding rests partially upon the assumption that Malcolm produced substantial evidence to prove the antitrust violations he alleged. But we offer no present opinion regarding whether Malcolm actually produced sufficient evidence for a jury to conclude that the defendants violated the antitrust laws in a manner that gives standing to Malcolm. Instead we merely reverse the order of a directed verdict for the reasons that were argued to this Court and the trial court.

REVERSED and REMANDED for proceedings not inconsistent with this opinion.

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33. The only purpose of this effort could have been to keep his stations open.

34. Admittedly, Malcolm could cancel these leases but that fact does not mean that the leases carry no evidentiary weight.

APPENDIX C

Patrick A. MALCOLM d/b/a Spar Oil Company and Spar Oil Company of Georgia, a corporation,
Plaintiffs-Appellants,

v.

MARATHON OIL COMPANY, Crown Central Petroleum Corporation, Tenneco Oil Company, et al.,
Defendants-Appellees.

No. 77-2515.

United States Court of Appeals,
Fifth Circuit.
Unit B

July 27, 1981.

Appeal from the United States District Court For the Middle District of Georgia; Wilbur D. Owens, Jr., Chief Judge.

David R. Aufdenspring, Gary G. Grindler, Atlanta, Ga., for plaintiffs-appellants.

Trammell E. Vickery, John C. Butters, Atlanta, Ga., for Tenneco Oil Co.

Charles L. Gowen, Joseph R. Gladden, Jr., Michael Eric Ross, Atlanta, Ga., for Marathon Oil Co.

Morton A. Sachs, Baltimore, Md., for Crown Central.

Charles Rippin, Edward T. Brennan, Savannah, Ga., for Colonial Oil Inc.

On Petitions for Rehearing

Before GODBOLD, Chief Judge, and TUTTLE and HILL, Circuit Judges.

PER CURIAM:

All defendants have petitioned for rehearing. We deny the petitions, 642 F.2d 845, 5 Cir. However, the petition of defendants Marathon Oil, Crown Central Petroleum and Tenneco reflects a misunderstanding of our opinion that we feel should be rectified.

Defendants argue that our opinion transforms the plaintiff's price-fixing allegations from a Sherman Act § 1 claim into a § 2 claim. As we noted in the panel opinion, Malcolm alleged that the defendants conspired to fix prices and used price cutting as an enforcement mechanism to gain compliance from recalcitrant retailers such as himself. The opinion merely holds that Malcolm submitted sufficient evidence of injury and damages stemming from this price cutting to avoid a directed verdict. Since the issue of whether Malcolm presented sufficient evidence of an anti-trust violation was not before us,[1] we did not decide that issue. Nor did we decide whether Malcolm's allegations of price cutting are more properly cognizable under § 1 or § 2 of the Sherman Act; this was neither briefed nor argued. We leave those issues to the district court on remand.

The petitions for rehearing are DENIED.

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1. Nor should it have been, since the district court had not yet decided that question, *cf. J. Truett Payne Co. v. Chrysler Motors Corp.*, ... U.S. ....., ..., 101 S.Ct. 1923, 1929-1930, 68 L.Ed.2d 442 (1981).

APPENDIX D

Relevant Statutes

The Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The Clayton Act

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX E

JOT-EM-DOWN STORE (JEDS) INC., formerly Farm Supply Center of Houston, Inc.,
Plaintiff-Appellant,

v.

COTTER AND COMPANY, et al.,
Defendants-Appellees.

No. 80-1014.
United States Court of Appeals,
Fifth Circuit.
Unit A

July 6, 1981.

Appeal was taken from an order of the United States District Court for the Southern District of Texas, Ross N. Sterling, J., which granted directed verdict in favor of defendants in antitrust litigation brought by member of a hardware retailers' cooperative against the cooperative and its other members. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that remand for statement of reasons was necessary in order to determine propriety of directed verdict in favor of defendants.

Vacated and remanded.

1. Monopolies (Key) 28(1.4, 7.6)

To recover treble damages in a suit for violation of antitrust laws, plaintiff must establish that there was a violation and that it actually caused him loss; however, even when those elements are proved, plaintiff must also establish amount of harm he suffered with sufficient certainty to enable trier of fact to assess damages.

2. Monopolies (Key) 28(7.6)

While amount of damages in antitrust suit is measured by a less exacting standard than proof of violation and injury, trier of fact must be furnished with evidence sufficient for a determination that the loss is not speculative.

3. Federal Civil Procedure (Key) 1827, 2126, 2547

While Federal Rules of Civil Procedure do not require a statement of reasons by a trial judge granting motion to dismiss, a summary judgment or a directed verdict, a reasoned statement is helpful not only to counsel but also to appellate court.

4. Federal Courts (Key) 941

Remand for statement of reasons was necessary in order to determine propriety of directed verdict in favor of defendants in antitrust litigation.

5. Monopolies (Key) 28(1.4, 7.6)

To recover treble damages under Clayton Act for a conspiracy in restraint of trade, in violation of Sherman Act, plaintiff must prove that defendants violated antitrust laws, that the breach caused injury in fact and, under a somewhat less rigorous standard, the actual dollar amount of the damage. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

6. Damages (Key) 184

While damages may not be determined by mere speculation or guess, it is enough if evidence shows extent of damages as a matter of just and reasonable inference, although result be only approximate.

Schleider, Ewing & Francis, Ben H. Schleider, Jr., Paul S. Francis, Houston, Tex., for plaintiff-appellant.

Crady & Peden, Charles C. Crady, III, Douglas S. Johnston, Houston, Tex., for defendants-appellees.

Appeals from the United States District Court for the Southern District of Texas.

Before RUBIN and GARZA, Circuit Judges, and SUTTLE*, District Judge.

ALVIN B. RUBIN, Circuit Judge:

[1, 2] To recover treble damages in a suit for violation of the antitrust laws, a suitor must establish that there was a violation and that this actually caused him loss. Even when these are proved, however, the plaintiff must also establish the amount of harm he suffered with sufficient certainty to enable the trier-of-fact to assess damages. While the amount of damages is measured by a less exacting standard than proof of violation and injury, the trier-of-fact must be furnished with evidence sufficient for a determination that the loss is not speculative, for not all antitrust violations cause loss and not all losses are measurable.

A member of a hardware retailers' cooperative contends that the cooperative and its other members violated the antitrust laws in several respects. After trial on the merits, the district court, without giving any reasons, granted a directed verdict for the defendants. We are required by the Supreme Court decision in *J. Truett Payne Company, Inc. v. Chrysler Corp.*, ... U.S. ....., 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981), to determine the sufficiency of the evidence to support a finding of antitrust violations

*District Judge of the Western Diestrict of Texas, sitting by designation.

before assessing injury in fact and quantum of damages. Because the district court did not assay the evidence on these issues separately and gave us no way to determine the reasons it directed a verdict, we remand so that it may do so.

Farm Supply, a Texas corporation, began to operate a retail hardware store in Houston in 1964. In 1967, it entered into a dealer contract with Cotter & Company (Cotter), one of the defendants. Cotter is a dealer-owned corporation engaged nationwide in the wholesale hardware business. It owns the "True Test," "Servess" and "True Value" trademarks. It also manufactures and distributes "True Test" paint and "Servess" lawnmowers. All of Cotter's stock is owned by its member dealers, save for ten shares of voting stock owned by its founder, John Cotter, who is a co-defendant. Cotter has 6000 dealer members engaged in retailing throughout the United States.

Cotter's gross sales in 1979 exceeded $1 billion. It is the largest hardware dealer in the United States. Its nearest competitor, Ace Hardware, also a dealer cooperative, had 1979 sales amounting to approximately $600 million.

Both Cotter and Ace aggregate the purchases of their member dealers to buy in large volume from manufacturers. In turn they resell in smaller quantities to members, passing along the price saving achieved.

Farm Supply contends that, in violation of the antitrust laws, particularly Section 1 of the Sherman Act, 15 U.S.C. § 1, Cotter (1) tied the purchase of advertising circulars and goods advertised therein to enjoyment of the True Value franchise program; (2) restrained its dealers from purchasing goods from Ace; (3) enforced territorial restrictions on its dealers; (4) restrained resale of its merchandise to discounters; and (5) engaged in price-fixing by setting uniformly the price stated in the cir-

culars. Moreover, Farm Supply urges that Cotter violated its contract with Farm Supply by ceasing important mailings and by terminating the franchise without a two-thirds vote of the Board of Directors. At the conclusion of Cotter's presentation of evidence, without submitting the case to the jury, the district judge directed a verdict in Cotter's favor.

[3, 4] Whether the evidence was sufficient to support a jury verdict on any one or more of the many charges, we do not attempt to determine ab initio from the record. The district judge gave no reasons, oral or written, formal or informal, for directing a verdict after all the evidence had been submitted. While the Federal Rules of Civil Procedure do not require a statement of reasons by a trial judge granting a motion to dismiss, a summary judgment or a directed verdict, we have often stated that a reasoned statement is helpful not only to counsel but also to the appellate court. *Williamson v. Tucker*, 632 F.2d 579, 585-87 (5th Cir. 1980). *See also Huckeby v. Frozen Food Express*, 555 F.2d 542, 545 n.4 (5th Cir. 1977); *Melancon v. INA*, 482 F.2d 1057, 1059 (5th Cir. 1973); *United States ex rel. Industrial Investment Corp. v. Paul Hardeman, Inc.*, 320 F.2d 115, 116 (5th Cir. 1963). *See generally*, C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2575 (1971); 5A J. Moore, Moore's Federal Practice § 52.08 (1980). In all but the simplest case, such a statement usually proves not only helpful, but essential.

The spotlight of the appeal is given its focus by the trial judge's written decision, which shapes and sharpens the issues and reveals the basis for his action. Llewewllyn, The Common Law Tradition, 19-21 (1960). When given such aid, counsel know what issues must be met and the appellate court need not scour the entire record while it ponders the possible explanations. Without the

light provided by such written findings and conclusions, we are unable to assess adequately the propriety of the directed verdict in this complicated antitrust action.

[5] To recover treble damages under Section 4 of the Clayton Act, for a conspiracy in restraint of trade, in violation of the Sherman Act, the plaintiff must prove that the defendants violated the antitrust laws, that this breach caused injury in fact, and, under a somewhat less rigorous standard, the actual dollar amount of the damage. *Story Parchment Co. v. Paterson Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Copper Liquor, Inc. v. Adolph Coors Company*, 506 F.2d 934, 953 (5th Cir. 1975); *Greene v. General Foods Corp.*, 517 F.2d 635, 660 (5th Cir. 1975). Because the economic harm is intangible and dissection of its extent is difficult, the wrongdoer, rather than the victim should bear "the risk of uncertainty that inheres in measuring the damage he causes." Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 Harv. L.Rev. 1566, 1572 (1967). *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, 66 S.Ct. 574, 580, 90 L.Ed.2d 652, 660 (1946). *See also* Lanzillotti, Problems of Proof of Damages in Antitrust Suits, 16 Antitrust Bull. 329 (1971); Guilfoil, Damage Determination in Private Antitrust Suits, 42 Notre Dame Lawyer 647 (1967); Timberlake, The Legal Injury Requirement and Proof of Damages in Treble Damage Actions Under the Antitrust Laws, 30 G.W.L.Rev. 231, 252-282 (1961); Comment, Monetary Recovery Under Federal Antitrust Statutes, 45 Tex.L.Rev. 856 (1967). *Compare Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (1975), *modified* 575 F.2d 564 (5th Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. denied*, 419 U.S. 487, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974).

[6] The amount of damage, like injury and causation, must be proved by sufficient evidence, but lesser certainty is required. *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d at 20. As the Supreme Court said in *Story Parchment*, "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. at 562, 51 S.Ct. at 250, 75 L.Ed. at 548. "[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Id.* at 563, 51 S.Ct. at 250, 75 L.Ed. at 548.

The complexity of the record makes it difficult for us to review the district court's directed verdict without any insight into the reasons the plaintiff failed to meet the standards for a directed verdict, articulated in *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), on one or more of these issues. In *J. Truett Payne Company, Inc. v. Chrysler Motors Corp.*, ... U.S. ....., 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981), the Supreme Court remanded a case arising under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), in which another panel of this Court reversed a verdict for the plaintiff and instructed the district court to dismiss the complaint because the plaintiff had "failed to introduce substantial evidence of injury attributable to the program, much less substantial evidence of the amount of such injury." The Supreme Court cited with approval its prior decisions holding that, if an antitrust violation is established, damages may be awarded even though there is a "degree of uncertainty" in proof. *Id.* 101 S.Ct. at 1929.

Evidence sufficient to support a "just and reasonable inference of damage" suffices. *Id. See also Zenith Radio Corp. v. Hazeltime Research*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed.2d 652 (1946).

The Court, however, held:

> Because the court below bypassed the issue of liability and went directly to the issue of damages, we simply do not have the benefit of its views as to whether respondent in fact violated § 2(a). Absent such a finding, we decline to apply to this case the lenient damage rules of our previous cases. Had the court below found a violation, we could more confidently consider the adequacy of petitioner's evidence.
>
> Accordingly, we think the proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence adduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act.

We do not know whether the district court's action was levered on failure to prove antitrust violations, fact of injury, damages, or all three. Like the Supreme Court, we are unable to review the district court's direction of a verdict absent a finding regarding the alleged antitrust violations. Only after such a finding is made, can this Court, or the district court, assess both that conclusion and the sufficiency of the proof of damages.

For the reasons given, and in accordance with the action taken by the Supreme Court in *J. Truett Payne, Inc.*, the judgment of the district court is VACATED and the case is REMANDED.

Supplemental Brief

81-874

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARATHON OIL COMPANY, CROWN CENTRAL PETROLEUM CORPORATION, TENNECO OIL COMPANY, and COLONIAL OIL INDUSTRIES, INC.,

Petitioners,

v.

PATRICK A. MALCOLM, f/d/b/a SPAR OIL CO. and SPAR OIL CO. OF GEORGIA,

Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

MARATHON OIL COMPANY, CROWN CENTRAL PETROLEUM CORPORATION, TENNECO OIL COMPANY, and COLONIAL OIL INDUSTRIES, INC.,

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Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

In compliance with Supreme Court Rule 28.1, petitioners hereby supplement their above-captioned Petition for Writ of Certiorari by stating that each petitioner is its own parent company, that Colonial Oil Industries, Inc. has no affiliates or non-wholly-owned subsidiaries, and that the other petitioners have the following respective affiliates or non-wholly-owned subsidiaries:

Marathon Oil Company

The Airport Company of Hilton Head Island, Inc.
Arbeitsgemeinschaft Steinkohle
Arctic LNG Transportation Company

Atlantic Nickel Mines Limited
Automotive Fuel Corporation
Automotive Fuel Corporation of Delaware, Inc.
Badger Pipe Line Company
Cavalier Petroleum Company of Cuba
Cheker-Imperial Oil Co. of Alabama
Cheker-Imperial Oil Co. of Arkansas
Cheker-Imperial Oil Co. of Georgia
Cheker-Imperial Oil Co. of Iowa
Cheker-Imperial Oil Co. of Kansas
Cheker-Imperial Oil Co. of Mississippi
Cheker-Imperial Oil Co. of Missouri
Cheker-Imperial Oil Co. of Nebraska
Cheker-Imperial Oil Company of Tennessee
Cheker Oil Company
Cheker Oil Company of Delaware, Inc.
Cheker Oil Company of Florida, Inc.
Cheker Oil Company of Indiana, Inc.
Cheker Oil Company of Michigan, Inc.
Cheker Oil Company of Ohio, Inc.
Cheker Oil Company of Wisconsin, Inc.
City Point Oil Terminal, Incorporated
CLAM Petroleum Company
Coastal Plains Oil Company
Compania Iberica Refinadora de Petroleos, S.A.
Cook Inlet Pipe Line Company
Deutsche Transalpine Olleitung GmbH
Domex Packaging Ltd.
Dor Rae Realty, Ltd.
East Texas Salt Water Disposal Company
ECOL Inc. (A Mississippi Corporation)
Elk Water Users Association
Explorer Pipeline Company
Farmers Union Central Exchange, Incorporated
Federal's Inc.
Globe Oil Company, U.S.A.
Gravcap, Inc.
Green Bay Terminal Corporation

Hilton Head Island Realty, Ltd.
Hilton Head Management Co., Inc.
Indonesian Enterprises, Inc.
International Petrodata, Inc.
Kenai LNG Corporation
Key Pipe Line Co. Ltd.
Kroll Glass Service, Inc.
Lafayette Parking, Inc.
LOCAP INC.
LOOP INC.
Magnorth Petroleum Ltd.
Marco South, Inc.
Mid-Wood, Inc.
Mustang Petroleum Company
Oasis Oil Company of Libya, Inc.
Oil Insurance Limited
Oil Shippers Service, Inc.
Oklahoma Oil Co.
Panwest Pty. Limited
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 2 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Pembalta Gas System No. 7 Ltd.
Pembalta Gas System No. 8 Ltd.
Petroleum Terminals, Incorporated
Pilot Oil Corporation
Platte Pipe Line Company
Polar LNG Shipping Corporation
Port Oil Inc.
P.V. Commodity Systems Ltd.
Qualbank, Inc.
Redwater Water Disposal Company Limited
Russell Stewart Oil Co.
Sage Creek Coal Limited
Sandcastle Land Company, Inc.

Sidon Canal Co.
Societa Italiana Per L'Oleodotto Transalpino, S.p.A.
Southern Ventures Pty.
Tideland Realty of Hilton Head, Inc.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich G.m.b.H.
U-Save, Inc.
Valley Beach, Inc.
Webster Service Stations, Inc.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyoming Industrial Development Corporation

Crown Central Petroleum Corporation

CMP Coal, Inc.
Pioneer Coal Company, Inc.
Race Fork Coal Corporation

Tenneco Oil Company

Parents:

Tenneco Inc.
Tenneco Corporation

Affiliates or Partially Owned Subsidiaries:

Border Gas, Inc.
Oil Insurance, Limited
Mid-Western Gas Transmission Co.
Houston Oil & Minerals of Columbia, Inc.
Cofap
Monroe Auto Pecas S.A.
Onner do Brasil S.A.
Deepsea Ventures, Inc.
Kern Island Water Company
Kern River Canal & Irrigating Company
Mesbic Financial Corporation of Houston
American Synthetic Rubber Corporation

Racine Commercial Airport Corporation
Southern Facilities, Inc.
Nuodex of Canada, Inc.
Tennagasco Gas Gathering Company
HT Gathering Company
Oasis Pipeline Company
Collings Pipeline Company
T&M Terminal Company
Adela Investment Company, S.A.
Almi S.A.
Losenhausen Maschinenbau AG
J. I. Case (S.W.A.) (Proprietary) Limited
Muodex Italiana S.p.A.
Nuodex Mexicana, S.A.
Nuodex S.A. Industria E Comercia de se Cantes
Somadoc N.V.
P.P.M. Guindastes Hidraulicos S.A.
Poclain S.A.
Constructions Mechaniques de Carvin
Derruppe, S.A.
Materiel Poclain de Sud Est.
Meaux Materiel
Poclain Canada Ltd.
Poclain Hydraulics, S.A.
Poclain Hydraulics Ireland
Poclain Italiana S.p.A.
Poclain Mexicana, S.A.
Potain-Poclain-Materiel, S.A.
Societe Financiere d'Etudes et de Gerance
Societe Mecanique Automobile de Touraine
Societe Mecanique de Tournai
Tallere Unidos, S.A.
S.A. Paper Chemicals Company (Proprietary) Limited
Societe Anonyme Industrille de Resines
Depositas del Norte, S.A.
Tees Storage Limited
Indonesian Enterprises, Inc.

Fedec Food Industries Limited
Albright & Wilson Match Phosphorus Company Ltd.
Akulu Marchon (Pty.) Limited
Akulu Chemicals (Pty.) Ltd.
Marchon-Paragon Holdings (Pty.) Ltd.
Marchon-Paragon Sulphonation
(Capte) (Pty.) Ltd.
Marchon-Paragon Sulphonation (Pty.) Ltd.
Albright & Wilson (Australia), Ltd.
Brooke Bond Oxo Ireland Ltd.
Oxo Company of Ireland, Ltd.
UIC-Marchon (Pty.) Ltd.
UIC-Marchon (M) SDN BHD
Albright, Morapji and Pandit Ltd.
Bush Boake Allen (Indian), Ltd.
Hundustan Flavours and Frangrances
(International) Limited
Bush Boake Allen (Jamaica), Ltd.
Bush Rafidain Flavour and Perfumery Co., W.L.L.
GMB Proteins Ltd.
W. J. Bush and Company (Ghana), Ltd.
W. J. Bush and Company (Nigeria), Ltd.
Erco Envirotech, Ltd.
Arndale Fules, Ltd.
Bracey Petroleum Products, Ltd.
Tenneco Oil Products, Ltd.
Interirac Viehmann & Co.
Corax-Trac S.A.
Vibromax France S.A.R.L.
Walker S.A.
Establissement Robert Bellanger, S.A.
Mil Potrero Mutual Water Company
Stoco Mutual Water and Sewer Company

Opposition

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No. 81-874

In the Supreme Court of the United States

October Term, 1981

MARATHON OIL COMPANY, CROWN CENTRAL PETROLEUM CORPORATION, TENNECO OIL COMPANY, and COLONIAL OIL INDUSTRIES, INC.,
Petitioners,

vs.

PATRICK A. MALCOLM, f/d/b/a SPAR OIL CO. and SPAR OIL CO. OF GEORGIA,
Respondents.

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QUESTION PRESENTED

Whether the appellate court's decision conflicts with this Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*

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No. 81-874

In the Supreme Court of the United States

October Term, 1981

MARATHON OIL COMPANY, CROWN CENTRAL PETROLEUM CORPORATION, TENNECO OIL COMPANY, and COLONIAL OIL INDUSTRIES, INC.,
Petitioners,

vs.

PATRICK A. MALCOLM, f/d/b/a SPAR OIL CO. and SPAR OIL CO. OF GEORGIA,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case (Pet. App. A 15-A 59) is reported at 642 F.2d 845. The opinion of the United States District Court for the Middle District of Georgia granting defendants' motion for a directed verdict (Pet. App. A 1-A 14) is reported at [1977-2] Trade Cas. ¶61,547 (M.D. Ga.). The opinion of the United States Court of Appeals for the Fifth Circuit denying the petitioners' petition for rehearing (Pet. App. A 59) is reported at 651 F.2d 1016 (5th Cir. 1981) (per curiam).

STATEMENT

Respondents Patrick A. Malcolm, f/d/b/a Spar Oil Company and Spar Oil Company of Georgia (hereinafter referred to jointly as "Malcolm") brought a private antitrust action against the petitioners and others on March 14, 1973. The respondents alleged a conspiracy to fix and stabilize the retail price of gasoline sold by independent marketers in a market which included the area where Malcolm did business. Malcolm further alleged that in order to enforce the conspiracy to fix, stabilize or otherwise effect the retail price, the defendants:

> "Sold below cost for long periods at various of defendants' retail stations located in cities where Plaintiffs did business to coerce Plaintiffs to return to retail prices set and approved by the members of the conspiracy." R. 85.

During the 1977 trial and after the petitioners had begun to present their evidence, the United States District Court in an oral opinion granted a directed verdict for all defendants on the issues of fact of injury and damages from which the respondents appealed to the United States Court of Appeals for the Fifth Circuit. Tr. Vol. XXI, pp. 1-16. The District Court did not venture an opinion on the Sherman Act violations. Tr. Vol. XXI, pp. 6, 16.

The petitioners argued before the former Fifth Circuit Court of Appeals and indeed admitted in their responsive brief that the question of liability was not before the Court. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 847 (5th Cir. 1981); Joint Brief For Certain Defendants-Appellees at pp. 5, 12 (". . . Malcolm's discussion of the alleged violations is not pertinent on this appeal.") Petitioners stated in their brief filed in the appellate court:

"Because [the District Court's decision] was grounded exclusively on Malcolm's failure to prove the requisite causation and amount of damage, the trial court expressly found it unnecessary to consider whether defendants had violated the antitrust laws in the abstract."[1] Joint Brief For Certain Defendants-Appellees, p. 12.

The Fifth Circuit Court of Appeals in its decision assumed an antitrust violation and expressly limited its inquiry to whether respondents showed substantial evidence at trial of injury and amount of damages so as to withstand a motion for a directed verdict. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 847, 851 & n.11, 852, 853, 854, 865 (5th Cir. 1981).

"The District Court ruled that the plaintiffs' evidence was insufficient only on the issues of injury in fact and amount of damages. That Court issued no ruling on whether the defendants violated the antitrust laws. The parties have not fully addressed the alleged conspiracy and substantive violations and, in fact, counsel on both sides agreed in oral argument that because of the scope of the trial court's ruling, this Court must assume that the violations did occur. Thus, this Court will assume that Malcolm sufficiently alleged and

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1. In their statement of the case, petitioners attempt without citation to the record to suggest that the assumed violations did not include the claim that the petitioners' unlawful and conspiratorial actions included the lowering of the price of gas among Malcolm's retail competition. However, petitioners' briefs before the appellate court made no attempt to characterize or narrow the assumptions regarding the antitrust violation.

Petitioners in fact *admitted* in their brief before the Fifth Circuit that Malcolm alleged that the conspiracy to raise the retail price of gasoline included actions by the defendants to lower the prices to non-profitable levels in an effort to force Malcolm to keep his prices up. Joint Brief For Certain Defendants-Appellees, p. 4, *Malcolm v. Marathon Oil Company*, 642 F.2d 845 (5th Cir. 1981).

> proved actions in violation of the antitrust laws and generally will seek only to answer the question: 'Given the alleged violations of the antitrust laws, did the plaintiff show substantial evidence of injury and amount of damages?' " *Id.* at 847.

Petitioners present as the sole reason for granting certiorari the argument that the decision of the Fifth Circuit in *Malcolm* "seriously misconstrued" this Court's holding in *J. Truett Payne Co. v. Chrysler Motors Corp.*, ... U.S. ....., 101 S. Ct. 1923, 68 L.Ed.2d 442 (1981).[2] The petitioners contend that the Court of Appeals in *Malcolm* "by implication . . . impose[d] an absolute prohibition against directing a verdict in any antitrust case for insufficient evidence of causation or damages absent a finding regarding the alleged antitrust violation." Petitioners' brief at p. 11. Petitioners' contention, however, belies the analysis by the Fifth Circuit panel.

After assuming the antitrust violation, the appellate court took almost 19 pages to discuss in detail its conclusion "that Malcolm introduced sufficient evidence of causation and amount of damage." 642 F.2d at 865. This conclusion was reiterated by the Court of Appeals when it denied the petitioners' request for rehearing.

> "As we noted in the panel opinion, Malcolm alleged that the defendants conspired to fix prices and used price cutting as an enforcement mechanism to gain compliance from the recalcitrant retailers such as himself. *The opinion merely holds that Malcolm submitted sufficient evidence of injury and damages stemming from this price cutting to avoid a directed verdict.*

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2. Because this is the only issue presented for review, Malcolm will not attempt to respond to the facts set out by the petitioners except to note that their account is replete with distortions and mischaracterizations.

> Since the issue of whether Malcolm presented sufficient evidence of an antitrust violation was not before us, we did not decide that issue." (Emphasis added.) *Malcolm v. Marathon Oil Co.*, 651 F.2d 1016 (5th Cir. 1981).

The one and only time the appellate court referred to this Court's holding in *J. Truett Payne* was in a footnote. In citing *J. Truett Payne*, the Fifth Circuit simply stated that the question whether *Malcolm* presented sufficient evidence of an antitrust violation was not and should not have been before the Court of Appeals, since the District Court had not yet decided that question.

The citation to *J. Truett Payne* was preceded by the introductory signal "Cf.", which means "compare." Black's Law Dictionary 289 (4th Ed. 1968). Nowhere, by implication or otherwise, did the appellate court in this case "impose an absolute prohibition against directing a verdict in any antitrust case for insufficient evidence of causation or damages absent a finding regarding the alleged antitrust violation."

ARGUMENT

The question which the petitioners present for review is grounded on their erroneous and unsupportable conclusion that the appellate court in this case "by implication . . . impose[d] an absolute prohibition against directing a verdict in any antitrust case where insufficient evidence of causation and damages 'absent a finding regarding the alleged antitrust violation' ". *See* petitioners' brief at p. 11.

In arguing what they apparently believe to be the proper interpretation of *J. Truett Payne*, petitioners state:

> "Where, as here, the District Court assumed that plaintiff had established a prima facie antitrust violation, indulged in every conceivable benefit of even the most lenient damages rules, and still found his evidence of causation and amount of damages to be inadequate, neither *Truett Payne* nor any principle of antitrust law or policy compels the trial judge to make a determination of culpability before directing a verdict on the issue of damages." Petitioners' brief at p. 11.

However, the decision of the appellate court in *Malcolm* and its denial of the petition for rehearing clearly rest upon an extensive and detailed analysis of whether or not the respondents adduced sufficient evidence at trial of causation and amount of damages to withstand a motion for directed verdict.

Since *J. Truett Payne* was decided subsequent to the main decision in *Malcolm,* petitioner can hardly contend that the appellate court misconstrued this Court's opinion. The former Fifth Circuit panel simply did not conclude that it must refuse to examine the proof of damages and causation in absence of a decision on liability by the District Court. On the contrary, the appellate court carefully and painstakingly examined the evidence adduced at trial and concluded that substantial evidence had been shown by *Malcolm* as to fact of injury and damages.

In the denial of the petition for rehearing, the Fifth Circuit clearly and unequivocally restated its previous holding that Malcolm "submitted sufficient evidence of injury and damages from this price cutting to avoid a directed verdict." *Malcolm v. Marathon Oil Company,* 651 F.2d 1016 (5th Cir. 1981). *The appellate court in this case did exactly what the petitioners are arguing is the proper interpretation of Truett Payne;* that is, the court

directly addressed the question whether the plaintiffs had failed to present substantial evidence of causation and amount of damage.

Consistent with petitioners' interpretation of *J. Truett Payne*, the decision on rehearing simply states that the question whether a violation had been proven was not before the court and should not be, since the district court did not address it. *Malcolm v. Marathon Oil Co.*, 651 F.2d 1016, n.1 (5th Cir. 1981). The rehearing decision *did not* state or even remotely imply that the question of liability must be addressed before the court of appeals could uphold a directed verdict for the defendants solely on the issue of fact of injury and damages. The statement in the footnote does not present the interpretation of *J. Truett Payne* of which petitioners complain.

Moreover, the citation to *J. Truett Payne* in the opinion denying a rehearing is preceded by the introductory signal "Cf." and, therefore, such citation does not even rise to the level of obiter dictum. *Pooton v. Berutich*, 199 So.2d 139 (District Court of Appeal of Florida 1967).[3]

Of equal significance is the fact that neither the respondents nor the petitioners at any time contended that

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3. The court in *Pooton* when presented with a citation preceded by "Cf." stated, in part:

> "In the first instance we cannot agree that such an insertion of a case citation with the appreviation "Cf." meaning 'to compare' can be considered as dicta. See 8 Fla. Jur. Courts, §168, 14 Am. Jur. §83 and 21 C.J.S. Courts §190. Secondly, as stated in 8 Fla. Jur. §168:
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> > • • • 'Such language, in the eyes of the law, is a gratuitous opinion, which whether right or wrong binds no one, not even the judge that utters it. It is without force as a judicial precedent, because the doctrine of stare decisis applies only to points that are involved and determined in a case in such a way as to be considered of compelling force as precedents in subsequent cases.' " 199 So.2d at 142.

the Fifth Circuit could not consider this appeal in absence of a finding by the district court on the issue of liability.[4] Therefore, the decision in *Malcolm* does not constitute precedent of any value for the strained and "implied' 'interpretation placed upon this case by the petitioner. *Webster v. Fall*, 266 U.S. 507, 511 (1925); *United States v. Mitchell*, 271 U.S. 9, 14 (1926).

> "Question which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall, supra*, at 511.

The petitioners' concern about the Fifth Circuit or the Eleventh Circuit's interpretation of *J. Truett Payne* may or may not be valid. The petitioners are obviously concerned not with the discussion in *Malcolm*, but rather with the discussion of *J. Truett Payne* by the Fifth Circuit in *Jot-Em-Down Store (JEDS) v. Cotter & Co.*, 651 F.2d 245 (5th Cir. 1981). *Jot-Em-Down* has no bearing upon the question whether the Court in *Malcolm* improperly interpreted *J. Truett Payne*. Indeed, even if petitioners' interpretation of *J. Truett Payne* was correct it would have no effect on this case since such a finding would do no more than place the matter back before the district court in the same posture it is in at this time. This is true because the appellate court in *Malcolm* made an extensive analysis of proof of fact of injury and damages without requiring a decision on liability by the district

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4. Without any basis whatsoever, the petitioners speculate that the appellate court's citation to *J. Truett Payne* was done to "apparently [absolve] any errors it may have made since the district court had not ruled on the question of violation". Petitioners' brief at p. 8. This constitutes a gross distortion of the court's denial of the petition for rehearing.

court. Whether or not the decision of *Jot-Em-Down Stores* misinterprets or conflicts with *J. Truett Payne* is immaterial to this petition.

The question presented, as framed by petitioners, is not even raised by the *Malcolm* decision and, therefore, this petition does not present any important questions which justify this Court's review nor does it present a decision which conflicts with applicable decisions of the Court as required by Rule 17 of the Supreme Court Rules. This simply is not an appropriate case to raise the question presented for review by the petitioners.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David R. Aufdenspring, do hereby certify that I have this day served the within and foregoing Brief For Respondents In Opposition by mailing three copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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This ..... day of November, 1981.

DAVID R. AUFDENSPRING